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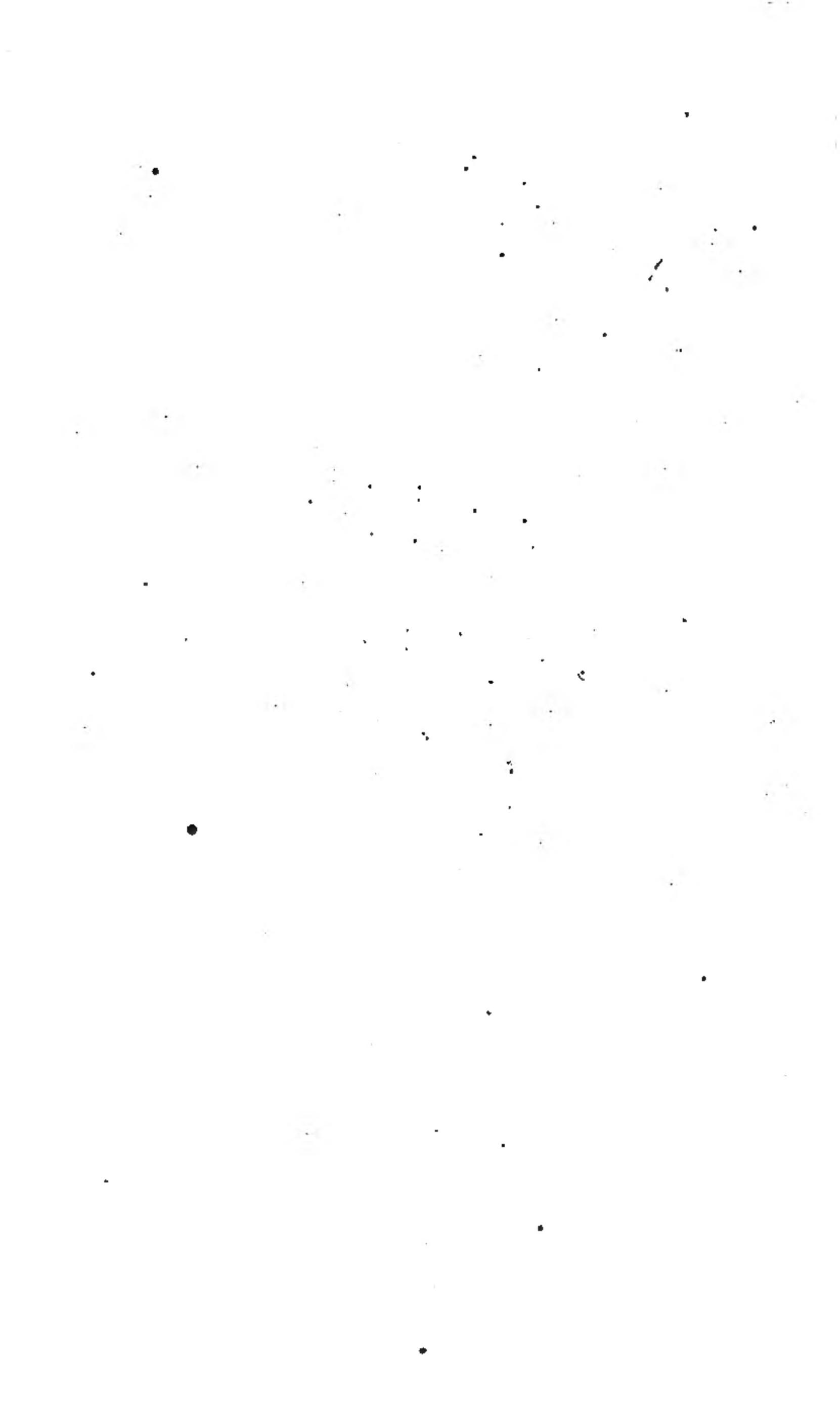
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CASES
ARGUED AND DETERMINED
IN THE
HOUSE OF LORDS;
DURING THE YEAR 1853.

EMMENS, Plaintiff in Error, ELDERTON, Defendant in Error.¹

February 17 and 24, 1852; and April 28, and August 12, 1853.

*Master and Servant — Attorney and Client — Retain and Employ —
Pleading.*

A count against the public officer of a joint-stock company stated, that on the 30th November, 1844, it was agreed between the plaintiff and the company, that from the 1st January then next, the plaintiff, as the attorney and solicitor of the company, should receive and accept a salary of 100*l.* per annum, in lieu of rendering an annual bill of costs for general business transacted by the plaintiff for the company, and should and would, for such salary of 100*l.* per annum, advise and act for the company on all occasions in all matters connected with the company, (the prosecuting or defending of suits, and the preparation of bonds or other securities, being excepted, the plaintiff being allowed in respect of such matters the usual charges of an attorney :) and it alleged, that in consideration that the plaintiff had, at the request of the company, promised to perform the same on his part, the company promised the plaintiff to perform and fulfil the same in all things on their part, and to retain and employ him as such attorney and solicitor of the company on the terms aforesaid: and assigned for breach, that the company, disregarding their promise and agreement, did not nor would continue to retain or employ the plaintiff as such attorney and solicitor of the company on the terms aforesaid, but, on the contrary, wrongfully, and without any reasonable cause, dismissed and discharged the plaintiff from such employment and retainer, and from thence hitherto have wholly refused to retain or employ him as such attorney and solicitor, or to pay him the salary aforesaid, by reason of which the plaintiff has wholly lost and been deprived of the said salary, and also of divers profits which he might have derived from such employment: —

Held, affirming the decision of the Exchequer Chamber, which reversed the judgment of the Court of Common Pleas, and in conformity with the opinions of eight out of nine of the

¹ Before Lord TRURO and other lords, assisted by the judges. The case was argued during the time that Lord TRURO held the Great Seal. The judges present were PARKE, B., PLATT, B., and MARTIN, B.; and COLERIDGE, J., MAULE, J., ERLE, J., WIGHTMAN, J., TALFOURD, J., and CROMPTON, J.

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judges who gave their opinions, that the plaintiff was entitled, after verdict, to judgment upon the above count.

If a declaration contains allegations capable of being understood in two senses, and in one sense it will sustain the action, and in the other it will not, after verdict it must be construed in the sense which will sustain the action.

THIS was a writ of error on a judgment of the Exchequer Chamber reversing a decision of the Court of Common Pleas. The case was originally an action of *assumpsit* brought in the Court of Common Pleas by the defendant in error against the plaintiff in error, who was sued as the nominal defendant, representing the Church of England Life and Fire Assurance Trust and Annuity Company. The declaration contained four counts, two of which only are material to state. First count—for that whereas, heretofore, to wit, on the 2d February, 1841, in consideration that the plaintiff, at the request of the said company, had agreed to become the permanent attorney and solicitor of the said company, and to act as such for reasonable reward to be therefor paid by the said company to the said plaintiff for his services in that behalf, they, the said company, promised the said plaintiff to retain and employ him as such permanent attorney and solicitor; and the plaintiff said, that after the making of the said agreement, and in pursuance thereof, to wit, on the day and year aforesaid, the said company did, in fact, retain and employ him as such permanent attorney and solicitor as aforesaid; and he, the plaintiff, then became and was and acted as the permanent attorney and solicitor of the said company, and hath always from thence been ready and willing to continue to act as the permanent attorney and solicitor of the said company, of which the said company had at all times notice; yet the said company, disregarding their said promise, did not nor would permit or suffer the plaintiff to continue to be the attorney and solicitor of the said company, or to act as such, but afterwards, and before the commencement of this suit, to wit, on the 25th May, 1845, without the consent of the said plaintiff, and against his will, appointed certain other persons, to wit, John Coverdale and Daniel James Lee, to be the attorneys and solicitors of the said company, and wrongfully, and without any just or reasonable cause for so doing, discharged the plaintiff from being or acting as the attorney and solicitor of the said company, and deprived him of all gains and profits which could have arisen or accrued to him in that behalf, to wit, gains and profits to the amount of 5,000*l*.

Second count—and whereas also, afterwards, to wit, on the 30th November, 1844, it was agreed by and between the plaintiff and the said company, that from the 1st January, then next, the plaintiff, as the attorney and solicitor of the said company, should receive and accept a salary of 100*l*. per annum, in lieu of rendering an annual bill of costs for general business transacted by the plaintiff for the said company, as such attorney and solicitor, and should and would, for such salary of 100*l*. per annum, advise and act for the said company on all occasions in all matters connected with the said company, (the prosecuting or defending of suits, the preparation of bonds or other securities for advances by the said company, and moneys dis-

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bursed by the plaintiff, being excepted, and the plaintiff being allowed, in respect of such matters, to make the usual and regular charges of an attorney and solicitor,) and that the plaintiff should attend the secretary of the said company, as well as the board of directors thereof, and the meetings of the proprietors thereof, when required; and the said agreement being so made, afterwards, to wit, on the 30th November in the year aforesaid, in consideration that the plaintiff had, at the request of the said company, promised the said company to perform and fulfil the same in all things on his part, the said company promised the plaintiffs to perform and fulfil the same in all things on their part, and to retain and employ him as such attorney and solicitor of the said company on the terms aforesaid: and although the said company did, for a certain small space of time thereafter, to wit, for the space of four months, in pursuance and fulfilment of the said agreement and of their promise in that behalf, retain and employ the plaintiff as such attorney and solicitor on the terms aforesaid, and did pay him a small part of the said salary, to wit, 50l.; and although the plaintiff was at all times, from the making of the said agreement hitherto, ready and willing to advise and act for the said company, and accept the said salary, on the terms aforesaid, and in all other respects to fulfil the said agreement on his part, of which the said company always had notice; yet the said company, disregarding their said agreement, did not nor would continue to retain or employ the plaintiff as such attorney or solicitor of the said company on the terms aforesaid, but on the contrary thereof, afterwards, and before the commencement of this suit, to wit, on the 25th of May, 1845, wrongfully, and without any reasonable cause, dismissed and discharged the plaintiff from such employment and retainer, and then and from thence hitherto have wholly refused to retain or employ him as such attorney and solicitor of the said company, or to pay him the salary aforesaid; by reason of which last-mentioned premises the plaintiff has wholly lost and been deprived entirely of the said salary of 100l., and also of divers great gains and profits which he might, and otherwise would, have derived from such employment, in and about the prosecuting and defending of divers suits respectively brought by and against the said company, and in and about the preparing of divers bonds, contracts, and securities for the said company, and otherwise, to wit, to the amount of 5,000l., and has been and is in other respects greatly injured and damnified.

The defendant in the action pleaded four pleas; and issue having been joined, the cause was tried at the sittings after Trinity term, 1846, when a verdict was found for the plaintiff, on the second count of the declaration, with 200l. damages. A verdict was also found for the plaintiff on the first count, but leave was reserved, by consent, to the defendant to move the court in *banco* that the verdict on the first count should be entered for the defendant. That motion was, afterwards made and granted. A rule was also granted by the Court of Common Pleas, and subsequently made absolute, for arresting the judgment on the second count of the declaration. 11 Jur. 612. The plaintiff brought a writ of error in the Exchequer Cham-

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ber upon the said arrest of judgment, and that court reversed the judgment of the Court of Common Pleas. 6 C. B. 177. From that decision the defendant in the action brought the present appeal, and assigned the following reasons for reversing it: First, that the second count of the declaration is not sufficient in law. Secondly, that the agreement set out in the second count, and which is pleaded, not *in hæc verba*, but according to its legal effect, does not contain, either expressly or impliedly, any contract on the part of the company to retain and employ the plaintiff. Thirdly, that if it be sought to sustain the second count on the ground that the promise therein alleged to retain and employ the plaintiff may be relied on as an express promise, independent of the agreement, then the count is bad, because there is no sufficient consideration to support such promise. Fourthly, that the only obligation imposed on the company by the agreement made with the plaintiff, was to pay to the plaintiff 100% at the expiration of the year mentioned in the agreement, and no breach of such obligation is alleged in the second count.

Hill and *Willes*, for the plaintiff in error.

Hoggins and *Cowling*, for the defendant in error.

The following authorities were cited, besides those referred to in the judges' opinions: Vin. Ab., "Condition;" Shep. Touch., "Condition;" 2 Chit. Plead. 205, 6th ed.; *Fawcett v. Cash*, 5 B. & Ad. 904; *Beeston v. Collier*, 4 Bing. 309; *Gandall v. Pontigny*, 1 Stark. 198; *Hartley v. Harman*, 11 Ad. & El. 798; *Hopkins v. Logan*, 5 M. & W. 241; *Kaye v. Dutton*, 7 Man. & G. 807; *Wilkinson v. Oliveira*, 1 Bing. N. C. 490; *Bainbridge v. Firmstone*, 8 Ad. & El. 743; and *Thornton v. Jennings*, 1 Man. & G. 166.

Willes, in reply.

At the close of the argument, the House submitted the following question to the judges: Would a plaintiff in the courts of law be entitled, after verdict, to judgment upon a count in the form of the second count set out in this record?

PARKE B. on behalf of the judges, requested time for deliberation.

April 28, 1853. The judges now attended, and delivered their opinions:—

CROMPTON, J. The question in this case is, whether the second count of the declaration is good after verdict. It stated that it was agreed by and between the plaintiff and the company, that from the 1st January, 1845, he, as the attorney and solicitor of the company, should receive and accept a salary of 100% per annum, in lieu of

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rendering an annual bill of costs for general business transacted by him for the company as such attorney and solicitor, and should and would, for such salary of 100*l.* per annum, advise and act for the company, on all occasions, in all matters connected with the company, (the prosecution and defence of suits, and preparation of bonds, and other securities, being excepted,) and that he should attend the secretary of the company, as well as the board of directors thereof, and the meetings of the proprietors thereof, when required. That in consideration that he had promised the company to perform the agreement on his part, the company promised him to perform the agreement on their part, and to retain and employ him as such attorney and solicitor of the company, on the terms aforesaid. That although the company did, for a small space of time thereafter, retain and employ him, as such attorney and solicitor, on the terms aforesaid, and pay him a small part of the said salary, and although he was at all times ready and willing to advise and act for the company, and accept the said salary on the terms aforesaid, and fulfil the agreement, of which the company had notice, yet that the company did not continue to retain or employ him on the terms aforesaid, but afterwards wrongfully, and without any reasonable cause, dismissed and discharged him from such employment and retainer, and from thence wholly refused to retain or employ him, or pay him the salary aforesaid.

The Court of Common Pleas arrested the judgment upon this count after verdict, on the grounds that the promise to retain and employ was not to be implied from the agreement, and that the consideration, being an executed one, would not support such promise. It must, since the decisions referred to in the argument on this point, be considered as settled law, that a count of this nature is bad, if the promise is more extensive than the promise which is implied by law as arising from the past consideration. According to this rule, the count will be bad if the promise to retain and employ the plaintiff below as such attorney, on the terms aforesaid, at all enlarges the general promise to perform the agreement. If the agreement itself contains this same promise to retain and employ as such attorney, on the terms aforesaid, then these words, being surplusage, will not prejudice the count, and must be taken as merely pointing the promise to the breach afterwards assigned for ceasing to retain and employ. If, on the other hand, the words in question at all enlarge the previous agreement, by binding the company to retain the plaintiff in any manner in which the agreement did not bind them, as by binding the company to find him any particular work, or to keep him in work, or to employ him in any of the business which he was not to do for the 100*l.* per annum, or to continue him in the employment for any time for which they were not bound by the agreement, the count will be bad for want of consideration to support this additional promise.

On reading the agreement, I concur entirely with the judgment of the Exchequer Chamber, as to the company being bound to continue the relation of employers and employed, at least for a year. The

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argument of the counsel for the defendant in error satisfied me that the engagement under the contract, in the words of both parties, for a lump sum, to be paid at the end of a year, in lieu of an annual bill of costs, cannot have been intended to continue for less than a year. The contract is for the sum of 100*l.* per annum, and not for payment at that rate; and I cannot think that the parties intended merely to substitute one mode or rate of payment for another, leaving it optional to the employers to put an end to the engagement at their pleasure. The plaintiff may have been induced to forego the usual charges of an attorney, from considering that he was to be paid for the whole year's work, and that, taking the rough and the smooth together, the 100*l.* would satisfy him; and the defendants probably preferred paying the certain sum for a certain time, to being subject to the uncertainty of the amount of the charges. It would be quite inconsistent with these views, that there should be a power of terminating the engagement, and paying the plaintiff for the services either according to the scale of attorney's charges, or *pro rata* in proportion to the work done, or the time during which he continued to serve. Supposing the case one of employment and service, the words of the contract appear to me as strong in favor of the engagement lasting during the year as the words in *Fawcett v. Cash*, 5 B. & Ad. 904, where an engagement to pay at the rate of 12*l.* 10*s.* per month, for the first year, and to advance 10*l.* per annum, until the salary was 180*l.*, was held to bind the employer to employ the plaintiff for one whole year. The agreement seems to me to be clearly a contract of hiring and service. It is specified what the party is to do, and what he is not to do, for the 100*l.* which he is to receive at the end of the year. Surely, this is an agreement, on the one hand, to hire for the particular service, at a given salary, for a year at least, and on the other, to serve in the specified matters, on those terms. Then are the words "retain and employ" to be construed as meaning any thing more than is to be found in the agreement itself? I am of opinion that they must be construed (especially after verdict) as correctly describing the effect of the preceding agreement, and as flowing out of, and really arising from, and implied by it; and I think that if the declaration, after stating the plaintiff's part of the agreement as the consideration, had, without mutual promises, merely stated a promise by the company to retain and employ the plaintiff as such attorney, on the terms aforesaid, it would have been proved by production of the agreement. The words "on the terms aforesaid" seem to me to limit the retainer and employment, to what has preceded; and the effect of the allegation seems to be, that the company engage to retain and employ the plaintiff according to the agreement, and no further.

The principal question has been raised as to the word "employ," and it has been argued that this word must be taken to mean that actual employment was to be found from time to time for the plaintiff. I think, however, that the words "retain and employ," as used in the present case, are a mere amplification of the preceding contract of hiring and service. These words are used in the precedents

continually, as meaning hiring, engaging, and keeping a person in a service, and do not necessarily imply that the master is bound to supply the servant with any particular work whilst the relation subsists. In *Fawcett v. Cash*, 5 B. & Ad. 908, when Taunton, J., said that the defendant was bound to retain and employ the plaintiff for the whole year, he surely did not mean more than that the relation of master and servant was to subsist during the year; and he could not be supposed to mean that the master was to be bound to supply the warehouseman with work during the year. The words "retain and employ" may, I think, be used either popularly or legally in the sense in which the Exchequer Chamber have construed them; and, if at all capable of such a construction, they are to be taken after verdict in the sense which will support the declaration.

It has been suggested that the words "retain and employ," as used in the second count, would be merely inoperative if used in the sense in which they were construed in the Exchequer Chamber, and that to give them any operation, they ought to be construed as meaning that the party was to be actually employed. Since the new rules prevented the old method of declaring in one count on the agreement, as set out, with mutual promises, and in another, on the legal effect of the agreement, it has not been unusual for pleaders to add to the promise to perform the agreement, a promise to do some particular matter which they suppose to be the legal effect of, or to be contained in it, and on which they subsequently assign a breach. This is a very dangerous mode of pleading, and is generally useless, as, if the promise be really contained in the agreement, it is unnecessary, and if not so contained, it may make the count bad. But, it has been often used in practice, probably for the purpose of applying the breach more pointedly to the promise; and I do not think that the adoption of such a mode of pleading can be fairly treated as showing that the pleader used the words in question in a sense which would make the promise larger than the agreement, and so make the count bad.

It was said, also, that the special damage laid for the loss of profit arising from the loss of employment, showed the sense in which the word "employment" had been used in the earlier part of the count. The real breach, however, is well and properly assigned for a dismissal from the situation, and is more applicable to such a dismissal, or putting an end to the relation between the parties, than to any refusal to find employment for the plaintiff; and it is to the promise, and the real breach which we are to look, to see whether the action is maintainable, the special damage being no essential part of the count, not being traversable, and, if bad, not vitiating the other part of the count. It is usual to include in the special damage, every possible claim, however unlikely to be supported, on the ground, that, if bad, it can do no harm, and that it may possibly prevent the plaintiff from being excluded at the trial from giving evidence of particular damage, of which the defendant may not have had sufficient notice from the real breach, by reason of its generality. It does not appear safe to refer to matter which is no essential part of the count, and which

may be stated in the loosest manner, without affecting the count, for the purpose of giving to the promise and breach, if otherwise good, and especially after verdict, a sense which would make them bad.

It was further contended in the argument, that there is a distinction between the cases, where there is the relation of attorney and client, and that of ordinary master and servant; and it was said, that in the case of domestic servants, there are collateral advantages, for the loss of which, an action for damages would lie; and that in such case, there is really a contract to keep in employment, in addition to what is said to be the only contract in cases like the present, to pay at the end of the year. I think, however, that this distinction is not tenable, and that wherever there is a contract for hiring, or employment, on the one part, and service for wages or salary, on the other, for a specified time, there is an engagement on the part of the employer, to keep the employed in the relation in question, during that time, and not merely to pay him the wages for the services at the end, and that in none of these cases does the obligation to keep retained and employed, necessarily import an obligation on the part of the master to supply the work. The warehouseman in *Fawcett v. Cash*, and the clerks and servants in the ordinary cases, could make no complaint if the master employed other persons, and there was no work for them, any more than the plaintiff in the present case could have complained if the defendants had given work to other attorneys, or had none to give to the plaintiff. It is said, however, that the only remedy in such cases, is, to wait till the end of the year, and sue for the wages or salary as a sum certain, averring that the plaintiff was ready all the time to perform, but that the defendant dispensed therewith. *Fewings v. Tisdale*, 1 Exch. 295, which was cited as showing the contrary, is distinguishable, as in that case the declaration was in *indebitatus assumpsit*, in the common form for work actually performed; and that decision is not necessarily inconsistent with a right to bring an action of debt for the sum certain, averring a continual readiness to the end, and a dispensation. Such a doctrine, however, would be liable to many of the inconveniences pointed out by the judgment in the Exchequer Chamber; and it would be much to be lamented if a servant, or agent, or clerk, who was dismissed, should be able to say: "I could easily get another situation as good, or better, but I will not do so; and, instead of claiming the real damage I have sustained by the inconvenience and temporary loss of situation, I will bring an action for every instalment of salary, till the contemplated period is elapsed."

It is not, however, necessary, in the present case, for your lordships to decide whether such an action could be maintained. There may be some contracts for payments, as by way of annuities for life or years, where, by reason of express stipulation, the payment may become due from time to time, until some default has happened on the part of the annuitant. There may be others where the salary depends on the performance of the labor, and where the only remedy in the case of a wrongful dismissal would be by action on the contract for damages. The question now is, whether there cannot be a

breach of such a contract of employment and service as the present by a dismissal; for if so, both parties have agreed on these pleadings that such a breach has taken place. It seems to me quite too late to question the principle upon which so many actions have proceeded in modern times, and which is, that after a dismissal the servant or party employed may recover such damages as the jury think the loss of the situation has occasioned. If he has obtained, or is likely to obtain, another situation, the damages ought to be less, or nominal, according to the real loss; and in such case the servant need not remain idle, in readiness to give services which cannot be wanted. I quite agree with what was said by my brother Erle, in this house, in the case of *Beckham v. Drake*, 2 H. L. C. 606; that where a promise for continuing employment is broken by the master, it is the duty of the servant to use diligence to find another employment. If such an action were not maintainable, and the only remedy were by action of debt for the salary, the servant could enter into no inconsistent employment; or, if he did, could recover nothing. Thus, suppose that the servant chooses to enter into a situation at a smaller salary, he could maintain no action at all, because he could not aver that he continued ready to serve till the salary became due. Suppose that a clerk or agent be engaged for some years at a yearly salary, and be wrongfully dismissed, surely he is not bound to remain idle, and to sue his employers every year for his salary, but he may engage himself elsewhere, and at once bring an action for the dismissal; and he does not, by engaging himself elsewhere, lose a right to this remedy, as he would to the other supposed remedy. If there be a contract to keep in the employment, it seems necessarily to follow that a dismissal from such employment is a breach of contract.

The result of the modern authorities, as to the remedies of a servant wrongfully discharged, is well discussed in the passage in Smith's *Leading Cases*, which has been so often referred to. He is said to have the election of treating the contract as continuing, and suing for damages for the breach by the discharge; or of treating it as, and acquiescing in its being, rescinded by the wrongful act of the master, and bringing an action on the *quantum meruit* for the work actually performed; and it is added, that he may wait till the termination of the period for which he was hired, and may then, perhaps, sue in *indebitatus assumpsit* for the whole wages, relying on the doctrine of constructive service. It is clear, since the decision of *Fewings v. Tisdale*, (*ubi sub.*), that this last remedy cannot be maintained in the shape of *indebitatus assumpsit*, for the simple reason, that the allegation of his being indebted for work done is untrue. But that decision may be supported on the form of action; and the question is still left undecided, how far a special action of debt, averring a contract to pay, a continuing readiness on the part of the servant during all the period to serve, and a dispensation from the service on the part of the master, might not be maintained. A great part of the argument of the counsel for the plaintiff in error, at your lordships' bar, proceeded on this point. But even supposing that they were correct, that such an action would have been maintainable on the particular

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contract, it by no means follows that the servant should be bound so to wait, and that he may not elect the first of the remedies, and sue for the breach in not continuing him in the employment. Whatever doubt remains as to the law on the supposed third remedy, I am not aware that the first has been ever doubted in cases where it appears that there was to be the continuing relation of employer and servant, which is the real question in this case. The cases of *Aspdin v. Austin*, 5 Q. B. 671, and *Dunn v. Sayles*, Ib. 685, must, I think, be considered as decided upon the construction of the particular covenants as applicable to the peculiar circumstances appearing upon the deeds in those cases. If they are to be taken as deciding that there is no obligation on the part of the employer to continue the relation between the parties in cases like the present, or that, where there is an agreement to employ and serve for a specified time at a specified salary, an action is not maintainable against the employer immediately for a wrongful termination of the relation, but that the party discharged, instead of suing for damages immediately, must wait and remain idle till the end of the specified period, and then sue for the salary as a sum certain, I should think that they ought not to be supported in a court of error. In the present case, I think that the contract was a contract for an employment and service to continue at least for a year; and that the promise to retain and employ, laid in the second count of the declaration, does not enlarge the promise arising from the employment; and that the wrongful dismissal, which is the real breach, gave a right of action for the damages really sustained by reason of the dismissal. I answer your lordships' question, therefore, by saying, that, in my opinion, a plaintiff would, in the courts of law, be entitled, after verdict, to judgment upon a count in the form of the second count set out in this record.

MARTIN, B. In answer to your lordships' question, I have to state, that, in my opinion, a plaintiff in a court of law would be entitled, after verdict, to judgment upon a count in the form of the second count set out in the record. In considering the question, I think the second averment in the count must be entirely disregarded. The promise there alleged is not supported by any consideration, and is a nullity. The first point is, what is the true meaning of the agreement stated in the first averment; and in my opinion it signifies that the company expressed their then present intention, that the plaintiff below should be their attorney for the year, from the 1st January, 1845, and that they agreed to pay him 100*l.* for transacting their general business during that period. There was no obligation upon them to give him any such business; but, at the expiration of the year, he would be entitled to receive the 100*l.*, provided he had been ready and willing during that period to transact for them such general business as they required him to do. I think, after verdict, the agreement may be taken to have been made on the 30th November, 1844; and the action having been commenced on the 8th January, 1846, a year's salary was earned, and the plaintiff is entitled to recover it, if it appear upon the face of the count that he was ready and willing

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to perform his part of the contract, and that the company have not paid him his salary. In my judgment, both these circumstances are distinctly averred; and I therefore think that the second count is good.

TALFOURD, J. Two principal considerations are involved in the question proposed by your lordships in this case: What is the true import of the agreement stated, as made between the parties, and which forms the sole consideration for the promise alleged? And, what is the effect of the breach or breaches complained of, violating such promise? The first consideration must, it is conceded, be confined to the matter alleged to be agreed, inasmuch as it is clear that the words added to the statement of mutual promises, "and to retain and employ him as such attorney and solicitor of the said company, on the terms aforesaid," cannot avail the plaintiff below, by extending the agreement to something not antecedently involved in it; as, if used in such sense, there is no consideration to support them, and if so understood, they vitiate the pleading. Is there, then, to be found in the preceding words of agreement, any contract which is afterwards shown by apt averment, to be broken? The question which has been mainly argued, is, whether any contract is alleged as made by the company to continue for a year with the plaintiff below, the relation of solicitor and client, which was broken by his dismissal and discharge, and the refusal of the company to continue to retain or employ him; and it appears to me that the count neither alleges nor implies such contract.

The agreement stated as that of the parties, seems to assume that the plaintiff below, was, at the time it was made, attorney and solicitor to the company, and appears to have had for its object the fixing and determining the extent and mode of remuneration, during such period as the relation should continue, but does not profess to determine the period for which such relation shall endure, or the circumstances, or the mode in which it may be determined by either of the contracting parties. It may contemplate such relation as probably subsisting for a year, or for many years; it may possibly be collateral to some other contract fixing the duration of such relationship; but it seems to me that, in itself, it does not by any necessary implication, bind the company to continue to retain and employ the plaintiff as their solicitor, in any sense, for any term, or to abstain during any period, from his dismissal. The case of *Aspdin v. Austin*, 5 Q. B. 671, and that of *Dunn v. Sayles*, Ib. 685, seem to establish that a contract, whether under seal or not under seal, to pay wages or salary during a stipulated time, does not imply an obligation to retain or employ the party entitled to receive it during the corresponding period; that, if able and willing to render service, he is entitled to demand his wages, but that he cannot insist on being enabled to earn them. I cannot distinguish the principle on which these cases are decided from that which should govern the present; for the degree of inconvenience which might result from implying a contract to retain or employ in any case, can scarcely be regarded as affecting the princi-

ple; and if it could have such operation, I cannot think the courts are bound to take judicial notice of the necessity that every joint-stock company must exist for at least a year, or that it must require the aid of a standing solicitor during that time. Indeed, in the case of *Aspdin v. Austin*, there was a circumstance which has no corresponding incident in the present case, by which a contract to employ might be rendered probable — that, at the end of the term completed in that case, a partnership was to be formed between the parties in the business, which was the subject of the previous services and salary. I therefore think that the count discloses no contract to retain the plaintiff below as solicitor to the company for a year; and consequently, that if there were no breach sufficiently alleged, except his dismissal from the employment of the company, the count would disclose no good cause of action.

But, I think the count does allege an agreement to pay the plaintiff below one year's salary of 100*l.*, and that it does assign a sufficient breach of that contract, in the non-payment of that salary. After alleging the agreement for salary, to take effect from the 1st of January next, — that is, the 1st January, 1845 — it alleges, that although the company did retain the plaintiff for a time, and paid him a small part of the salary, and although he was at all times ready and willing to advise and act for the company, and to accept the said salary on the terms aforesaid, and in all respects to perform the agreement, whereof the company had notice, yet the company, before the commencement of the suit, to wit, on the 25th May, 1845, wrongfully dismissed the plaintiff from such employment and retainer, and “then and from thence, hitherto have wholly refused to retain him, or to pay him the salary aforesaid; by means whereof the plaintiff has wholly lost and been deprived of the salary of 100*l.*, and also of gains and profits in respect of the matters which the salary was not to include.” Now, considering that, according to the record, a full year had elapsed from the day whence the salary was to commence, and that the day of its payment had arrived, I think there is alleged a continuous refusal to pay, and a default in payment of that sum, which had so accrued due; that such is the meaning, any ordinary reader would attribute to the allegations as to salary; and that, after verdict, this meaning ought to be applied to them.

It may still be objected to the count that the words which follow the mutual promises, “and to retain and employ him as such attorney and solicitor of the said company on the terms aforesaid,” expand the promise beyond the consideration, and so render the count vicious, though without them there might be a good contract alleged, and a sufficient breach applied. This objection would prevail if the expressions were such as must necessarily be construed so to extend the sense; as if, for example, they had been, “and to retain and occupy the plaintiff for the term of one year;” but I think their reasonable construction is that of mere tautology, and that they imply no more than that the company, while they shall retain and employ the plaintiff, will do so on the terms aforesaid; that is, that they will pay him at the rate of 100*l.* a year for certain business, and will allow him while

in their employ, to make for other matters, the regular solicitor's charges. In this sense the words are superfluous, and will not vitiate. For these reasons, considering that the count discloses a contract, on sufficient consideration, to pay a salary of 100*l.* for a year, which had expired, for services which the plaintiff was willing to render during the period, and a sufficient breach of such contract, I answer your lordships' question, whether the count is sufficient after verdict in the affirmative.

WIGHTMAN, J. Your lordships in this case, have proposed the question, "whether a plaintiff in the courts of law would be entitled, after verdict, to judgment upon a count in the form of the second count set out in the record." I was of opinion at the time the judgment of the Court of Exchequer Chamber was given, (to which judgment I was a party,) that the second count of the declaration was maintainable after verdict, and I am of the same opinion still. The Court of Common Pleas considered the second count bad, on the ground that the consideration, as stated, would not warrant the promise alleged to have been made by the defendants in the court below. The Court of Exchequer Chamber, reversed the judgment of the Court of Common Pleas, being of opinion that the agreement stated in the second count, warranted the promise and the breach. It is stated in that count, that it was agreed by and between the plaintiff (Elderton) and the said company, that from and after the 1st January, then next, the plaintiff, as the attorney and solicitor of the said company, should receive and accept a salary of 100*l.* per annum, in lieu of his bill of costs, and should for such salary, advise and act for the company on all occasions in all matters connected with the company, with certain exceptions, and should attend the secretary and board of directors of the company, and meetings of proprietors, when required. It was then alleged, that in consideration that the plaintiff had, at the request of the company, promised to perform the agreement, the company promised the plaintiff to perform it also, and to retain and employ him as such attorney and solicitor of the company, on the terms aforesaid; and it was then stated as a breach, that the company would not continue to retain or employ the plaintiff on the terms aforesaid, but wrongfully dismissed him from such employment, and refused to retain or employ him as such attorney and solicitor of the company, or to pay him the salary.

It was contended on behalf of the company that the agreement, as stated in the second count, did not contain any contract by them to retain or employ the plaintiff, either express or by implication. If it did, the addition of the special promise to retain and employ, to the general promise to perform the agreement, would be but surplusage, and unobjectionable after verdict. The question is, what is the effect of the agreement stated in the second count, as it is there stated? It is not necessary that a covenant or agreement should be couched in express terms. There may be a covenant or agreement contained by necessary implication, in terms which do not directly amount either to a covenant or agreement. An instance occurs in

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the case of *Pordage v. Cole*, 1 Saund. 319. It was there held, that where it was agreed between two parties that one should give the other a sum of money for his land, there was a covenant or agreement by the party who was to receive the money to convey the land. That case, in principle, is strongly applicable to the present. In this case it was agreed by the plaintiff and the company that he, as the attorney and solicitor of the company, should receive and accept a salary of 100*l.* per annum. The salary, being 100*l.* per annum, was intended to last for one year at least; and as the plaintiff agrees that he, as the attorney and solicitor of the company, will accept a salary of 100*l.* a year, there is an implied agreement on the part of the company that he shall be their attorney and solicitor for a year at least, and that they will pay him the salary which he has agreed to accept. It is not necessary for the fulfilment of the agreement that he should be exclusively the attorney and solicitor of the company, nor that they should find him work to do. The terms "retain and employ" would be satisfied by the company keeping the plaintiff in their service or employ, in case they should have any work for him to do, though it may be that they found him none. The defendants agree with the plaintiff that he, as solicitor of the company, should receive and accept a salary of 100*l.* per annum, instead of sending in an annual bill of costs, and would act for the company for that salary in all matters connected with the company, with certain exceptions. What are the obligations upon the parties to such an agreement? I should say, that for a year at least the attorney would be bound to transact the general business of the company for that salary only, and the company would be bound, for the same period at least, to keep him in their retainer and employment as an attorney and solicitor, though they might have no work for him to do. The word "employ" does not necessarily mean employed in actual work, but, as observed in the judgment in the court below, may be fulfilled by keeping him in their service. It is, in effect, a contract for employ in the sense of service and pay; and the breach is, that the defendants have neither employed him, nor paid him, although he was always ready to act for the company, according to the terms of the agreement. It does not appear to me to be necessary to advert to the cases that were cited upon the argument, as the question in this case turns upon the meaning and effect to be given to the words "retain and employ," as used in the count in question. The construction contended for by the plaintiff, and adopted by the Court of Exchequer Chamber, appears to me to be the correct one; and I therefore answer your lordships' question in the affirmative.

ERLE, J. I am of opinion that your lordships' question must be answered in the affirmative. The point is, whether the defendants, by the agreement stated in the second count, contracted to retain and employ the plaintiff as attorney and solicitor on the terms of that agreement; and if "retain" means to keep in pay, or to hire, and "employ" means to engage in a service, as explained in the judgment of the Exchequer Chamber in this case, it is clear that the

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defendants did both retain and employ the plaintiff when they agreed to pay to him 100*l.* annual salary, in consideration of certain services as attorney and solicitor, to be performed by the plaintiff, if required. Although these words may be capable of another meaning, and, construed in this sense, are superfluous in this declaration, still, after verdict, if, among the meanings which the words are capable of, there be only one that will support the declaration, it is a rule of construction that that meaning should be adopted. The agreement for the services of an attorney at an annual salary appears to me to constitute the relation of employer and employed for not less than a year; and the breach shows that this relation was put an end to, contrary to the contract so understood. It follows, according to the general law relating to contracts, that an action lies for this breach of contract as soon as it has taken place, and that the measure of damage is an indemnity to the plaintiff for his loss by the breach. It has been contended, on the authority of *Apsdin v. Austin*, 5 Q. B. 671, and *Dunn v. Sayles*, Ib. 685, that, in cases of contracts for service and for salary during a time, the employer may put an end to the employment before the time has expired, and is not liable to any action, if, at the period for payment of salary, he pays the amount. But I presume that no such general doctrine was intended to be laid down at the time when the court put a construction upon the contracts in those two cases. If it was, I must express my dissent from it. When this relation is determined, the party employed is at liberty to find other employment; and if other equally eligible employment is at his option, the indemnity for the loss by breach of contract would be a small amount; but if the circumstances are reversed, the employment under the contract may be such that the damages may exceed the salary.

PLATT, B., after stating the second count, proceeded as follows: The plaintiff in error contends that this count does not show a sufficient cause of action, and that the judgment of the Court of Exchequer Chamber should be reversed; and your lordships have thereupon proposed to her Majesty's judges the following question of law: "Would a plaintiff in the courts of law be entitled, after verdict, to judgment upon a count in the form of the second count set out in this record?" The count is framed in *assumpsit*, upon mutual promises. It begins by stating a mutual contract between the plaintiff and the company, the company engaging that the plaintiff, as their attorney and solicitor, should receive, and the plaintiff engaging that he should accept, a salary of 100*l.* per annum, in lieu of rendering an annual bill of costs, and that he should and would, for such salary of 100*l.* per annum, perform certain services when required. This agreement appears to me to have clearly established the relation of employer and employed for the period of a year, at a salary of 100*l.* But it is urged that the agreement so stated does not justify the mutual promises as laid, and that the consideration for the promise of the defendants being executed, the plaintiff could not append to their promise to fulfil the agreement on their part a promise to retain

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and employ him as such, their attorney and solicitor on the terms aforesaid. It, however, seems to me, that the promise to retain and employ, results, by legal implication, from the terms of the agreement, and that its introduction operates as a mere repetition of matter contained in the general expression immediately preceding it, and would not therefore vitiate the count. I have used the word "employ" in the sense adopted by the Court of Exchequer Chamber. If this construction of the contract, and the implication from it, be correct, the breach is well assigned, and the count is good in substance; but if the allegation of mutual promises cannot be supported, it may be rejected as surplusage. The remainder of the count would then show the contract, the plaintiff's readiness to perform his part of it, and the breach of it committed by the defendants in wrongfully and without reasonable cause dismissing and discharging the plaintiff from his employment and retainer, and refusing to pay him his salary. My answer, therefore, to the question proposed by your lordships is, that, upon a count in the form of the second count set out in this record, a plaintiff in the courts of law would be entitled, after verdict, to judgment.

MAULE, J. In order to answer this question, it is necessary to consider whether the breach of promise in not continuing to retain and employ the plaintiff as attorney and solicitor, but dismissing him, is a breach of any promise which the count shows the defendants to be bound by, so as to give the plaintiff a cause of action against the defendants. That this dismissal, and not the non-payment of the salary, (which is also alleged in the count,) is the only breach and cause of action, if any contained in the count, there is no doubt. It was so agreed in the argument before this house, and in the courts below. It is, therefore, not necessary to say any thing in proof of this proposition. The breach being so understood, it was objected to this count, (among other things,) that the promise to retain and employ the plaintiff, being founded on an executed consideration, that is, on the agreement made before the promise, is without sufficient consideration, not being such a promise as the law would imply from the consideration, or, which is the same thing, (when the consideration is a preceding agreement,) not being comprised in the agreement itself. It was not denied that such was the rule with respect to promises on executed considerations, and as it is a rule well established by decisions, it is not necessary to give any reasons in its support, or to say any thing to show it to be a good and useful one.

On this part of the case it was further agreed that the agreement, as stated according to its legal effect in the declaration, does not contain any promise to employ the plaintiff in the sense of giving him work to do. But the defendant in error insisted that the promise to retain and employ as stated in the declaration, did not comprehend any obligation to give any work to the plaintiff to be done, but only meant that the defendants would continue the relation of attorney and client between the plaintiff and themselves, giving him business to do or not, as they pleased, but paying him his salary while that

relation should continue: and this promise, that is, to retain and employ in this sense, it was said, was comprehended in the agreement, and therefore implied by law from the fact of making the agreement. What "chiefly weighed" with the Exchequer Chamber when it adopted this construction was, that it supported, (as that court held,) the declaration; whereas the other construction, which treats the word "employ" as comprehending giving work to do, would, (as it was insisted by the defendants, and admitted by the plaintiff and the court,) make the declaration bad. And there is no doubt that it is a rule of construction, that of different meanings of a pleading which is susceptible of more than one, that is to be adopted, after verdict, which will support the pleading; and it may further be conceded, that the word "employ" is sometimes used in the sense which this construction gives it, though it may be questioned whether this word can properly be understood in this sense on the present occasion. So to understand it will render wholly inoperative the promise to retain and employ, which is stated as an additional and distinct promise beyond that to perform the agreement, but which this construction treats as comprehended and involved in the promise to perform the agreement. And further, this sense is not consistent with the allegation in the declaration, which states, as a consequence of the dismissal, not only the loss of the salary, but of the gains and profits which the plaintiff otherwise might and would have derived from such employment. This allegation, it is true, is not necessary to show a cause of action, and the plaintiff might succeed without proving it; but it is not the less effectual in showing that the word "employ" is used in the sense usually given to it, and not in that which the construction in question ascribes to it. If this be the true sense of the word as used in this declaration, the count is undeniably bad.

But assuming that the word "employ" may, notwithstanding these reasons, be construed in a sense in which it does not add any thing to the promise contained in the agreement, and that the declaration may be construed as if it contained no promise but that to perform the agreement, it is still to be inquired whether the declaration so construed will show a cause of action. This is, indeed, the substantial question in the cause, and is in effect this, whether the agreement stated in the declaration obliges the defendants to continue the relation of attorney and client between themselves and the plaintiff for a year; and this depends upon the true meaning of the agreement, as stated in the declaration. Now, it is to be observed that that agreement does not in terms provide that the plaintiff shall act as the defendants' attorney, or that they should employ him, (in any sense of that word,) but begins by providing that from the 1st January the plaintiff, as attorney and solicitor of the defendants, should receive and accept a salary of 100*l.* per annum, in lieu of rendering an annual bill of costs for general business. It then goes on to show what shall and what shall not be general business within the meaning of the parties; that is, that certain attendances shall be, and business about suits at law, &c., shall not be, general business, to be paid for by the 100*l.*; and this is all that the agreement contains. The plain

object, therefore, of the agreement appears to be, the substitution of a new mode of payment for certain business for a mode previously acted upon, or intended, or agreed on, or contemplated between the plaintiff and the defendants; and this object, and this only, it appears to effect, leaving every thing else in the relation between the parties as it stood before the agreement, or entirely at large if no relation at all subsisted. On this view, the meaning of the agreement is, that the plaintiff, if he continue the service a year, shall be paid 100*l.* for his general services; but if he do not, his right as against the defendants, and theirs against him, remain to be regulated by any other agreement which may have provided for such an event, or by the general law as applicable to the transactions which have taken place between them. That the agreement contemplates the possibility or the probability that the plaintiff may continue in the service of the defendants for a year, or for a number of years, there is no doubt. It certainly provides for that event, and, indeed, for no other; but it by no means follows that it was the intention of the parties to bind themselves by this agreement that such an event should take place. There are no words importing such an obligation; and it would manifestly be inconvenient that any such obligation should exist in the absolute and unqualified form in which, (if at all,) it must be considered as contained in this agreement.

Nothing is more common than to make an agreement in the expectation that a certain state of things will arise or will continue, and with provisions and stipulations applicable to such expected continuance, and which cannot take effect in any other event, yet without any intention that the parties shall be bound to continue the contemplated state of things. The cases of *Aspdin v. Austin*, 5 Q. B. 671, and *Dunn v. Sayles*, *Ib.* 685, are instances of agreements in which a certain duration of the relation between the parties, was contemplated and provided for, without binding the parties to continue it for the time contemplated. But probably the case in which an alteration in the amount or mode of payment, and that alone, is intended, is of the most frequent occurrence of this class of agreements; and, as before observed, the agreement in question apparently contains no other provision. If the agreement had been intended to provide for the continuance of the engagement, it is difficult to conceive that it would not have contained express and detailed provisions on the subject, and particularly some provisions for putting an end to the engagement by notice or otherwise. The inconvenience of the defendants being bound, at all events, if not to use the actual services of the plaintiff, at least to hold him out as filling a confidential situation in their service for a year, or indeed, (as the agreement contains nothing to restrict the employment to one year, nor any power to put an end to it,) for an indefinite number of years, and themselves to carry on their business for the same time, is of the same nature as the inconvenience relied on by the Court of Queen's Bench in the cases cited. The present case was, indeed, distinguished in the Court of Exchequer Chamber from those in the Court of Queen's Bench, as regards the argument from inconvenience, inasmuch as it said by

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the court, that the defendants "were a company which was sure to continue for the term of a year." But this distinction does not appear to be well founded. If this particular company were one that was sure to continue a year from the time of the agreement, this is a fact not apparent on the record; and, supposing the Court to have been well assured of this fact by some other means, it cannot properly be taken into consideration in deciding whether this count be good or not; nor can it be said that joint-stock companies in general, are sure to last a year from the time of making an agreement respecting the employment of an attorney, or from any other time, so as to enable the court to notice this as a matter of general notoriety. The experience of courts of justice in winding up cases, and others in which such companies are concerned, is sufficient to show that nothing certain can be affirmed with regard to their probable duration. Considering, therefore, this agreement to be one merely regulating the mode of payment of the plaintiff, and not binding either party in any other respect, it follows that it imposes no such obligation as the breach in this count assumes to exist, and consequently that the count shows no cause of action, and that a plaintiff in the courts of law would not be entitled, after verdict, to judgment upon a count in the form of the second count set out in this record.

COLERIDGE, J. In answer to the question proposed by your lordships, I have to express my opinion, that, upon the second count of this declaration, a plaintiff in the courts below would be entitled to judgment after verdict; and as my opinion turns upon the construction of the count itself, and I do not controvert the principle on which the judgment of the Common Pleas in the principal case proceeded, but its application only, I need not express myself at any great length. The question, then, on this assumption, is, whether the defendants' promise, as alleged in the declaration, goes beyond that which the law would imply from the executed consideration on which it is founded. Now, that will depend on how much the law would imply from that consideration, and how much the declaration alleges to have been, in fact, promised. The agreement between the parties, a mutual act, in which both concur, is to this effect: Elderton, as the attorney and solicitor of the company, is to receive from them, and they, of course, to pay him as such, a salary of 100*l.* per annum, and for that salary he is to advise and act for the company on all occasions in all matters connected with them; but the prosecution and defence of suits, the preparation of bonds or other securities for advances made by them, and disbursements of money by him, are excepted, and in respect of such matters he is to be allowed to make, and they of course, engage to pay, the usual and regular charges of an attorney or solicitor. Now, it seems to me clear that the parties contemplated here an agreement to subsist for a year certain at least, subject, of course, to determination in case of the plaintiff's misconduct or neglect, or any such adequate cause for discharge. The stipulation is for a salary of 100*l.* by the year, not at the rate of 100*l.* for a year; and it is unreasonable to infer that any less period of

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duration, or no period at all, was contemplated when an attorney agrees to forego the ordinary and more lucrative mode of payment for services to be rendered from time to time as such, and accept in lieu thereof a fixed sum.

Next, I think it clear that the agreement binds the company during that year, not, indeed, to prosecute or defend suits, or to make advances which would require the preparation of bonds or other securities, in order to find work for the plaintiff, but in case such suits should arise, or such securities be required, then to use the services of the plaintiff as their attorney and solicitor in the prosecution or defence, or the preparation of them respectively, and then to pay him the usual and regular charges of an attorney and solicitor. The whole agreement is to be taken together, and the employment in the excepted cases, should they arise, with the permission in those to make the usual charges, may reasonably have been the inducement to consent to forego that mode of charging for the services specified in the earlier part. No man, I think, but one conversant with the astute criticism which lawyers sometimes exercise on language, could doubt that this was the meaning of the parties. Suppose it had been distinctly stated to the plaintiff: "If there are suits to be prosecuted or defended during the year, and we use you as our attorney therein, you may charge in the usual way, but remember, we do not engage so to employ you," it is clear, not only that a very different and less advantageous agreement would have been presented to him for acceptance, but also one which would have made it quite unnecessary to introduce any stipulation at all as to the mode of payment; for these suits, and the preparation of bonds and securities, being excluded from those services for which the salary was to be paid, and employment in them, if they arose, being by the hypothesis to depend on the will of the company, as the case might arise, there could be no pretence for saying that the salary was to include them, or that any other than the usual rate of charge was to be made and paid, unless as each case arose, a specific bargain should be made. I think courts of law should expound the language of agreements, not strainedly or with over refinement, but as closely as they can, putting themselves into the situation of the parties, according to what they believe to have been their intention and understanding in the language they have used.

This being, in my view of it, the sense of the agreement, what is the promise founded on it? It is, that "the company are to perform and fulfil the same in all things on their part, and to retain and employ the plaintiff as such attorney and solicitor of the said company, on the terms aforesaid." The latter clause of this sentence is said to raise the difficulty; but either it expresses no more than is expressed by the former branch, or it adds something to it. If it adds nothing, it is merely tautologous, and will do no harm; and this is my view of the case; for I think there was an agreement by the company, so to retain and employ the plaintiff as attorney and solicitor in the only sense in which such an agreement could ever be reasonably made—that is, if they should have occasion for the actual services of any one as such; and this seems to me to be all

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that these words import. I think, if any one of your lordships had promised to retain and employ A. B. as your attorney for a given time, you would be surprised to be told that your promise was broken, unless you had a suit or suits pending during the whole of that time. On the other hand, if, during that time, you were asked who was your attorney—in other words, whom you employed as such—you would have no difficulty in answering, that, in consequence of a promise you had made, A. B. was your attorney, or that you employed A. B. as such. But if these words express more than the first branch of the sentence, as I agree that that branch exhausts all the agreement between the parties, then the agreement must mean less than I suppose it to mean. Holding, however, the conclusion which I do as to its meaning, I think the promise is not too largely laid, though it might have been more briefly expressed.

PARKE, B. In answer to the question proposed by your lordships, I have to state my opinion that the plaintiff, in the courts of law, would be entitled to judgment upon a count in the form of the second count set out in this record. The substance of the question in the case lies in a very narrow compass. Assuming that the alleged promise “to retain and employ” cannot be held valid on this count, unless it is implied in the agreement previously stated, the question is this: In a mutual agreement between the plaintiff below (an attorney and solicitor) on the one hand, and a life and fire assurance and annuity company on the other, the terms of which are, that it is agreed between them that the plaintiff, as the attorney and solicitor of the company, should receive and accept a salary of 100*l.* per annum in lieu of rendering an annual bill of costs for general business done for the company, and should for such salary of 100*l.* advise and act on all occasions, with certain exceptions, is it or is it not implied that the company hire him for one year certain? I must say I feel no doubt in giving the opinion that it is so implied. The term “it was agreed” makes the words of the agreement those of both parties; and where two parties agree that one shall accept and receive a yearly salary of 100*l.* as attorney and solicitor of the other, and for a particular class of business, it is necessarily implied that the other shall pay it, and at the end of the year. It is not to be paid, simply and at all events, at the end of the year, but as a reward for the services of the other as an attorney and solicitor, for his attendance and advice when required, and being ready to give it whenever it shall be asked, at all times during that year. In this respect, the agreement being by both parties, the present case is distinguishable from *Sykes v. Dixon*, 9 Ad. & El. 693. So far, if I correctly understand, the parties do not differ.

But the plaintiff in error contends that the only agreement to be implied on the part of the company is, that they will pay the 100*l.* at the end of a year for the services of the plaintiff below, as attorney and solicitor, in the matters specified in the agreement, and that they do not hire, or, in other words, agree to retain him in their service in that character, in the mean time. On the other hand, the defendant

in error contends that in such an agreement, there is also implied a hiring or agreement to retain in that character, for a year; and I am of that opinion. I think that there is clearly implied, on the part of the person who contracts to pay a salary for services for a term, a contract to permit those services to be performed, in order that the stipulated reward may be earned, besides an agreement to pay the salary at the end of the term. It seems to me that this is clearly an agreement to retain for a year, certain; and the only doubt I have felt since the case was first argued in the Exchequer Chamber, has been, whether there was an implied agreement to employ the plaintiff. There is not, if that term is used in the sense of giving him business to do, for no such obligation is cast on the company; but if it means only to engage his service, (one of the meanings of that term given in Johnson's and Webster's Dictionaries,) there is an implied promise to that effect. The employment in many capacities may be said to continue where the use of actual service is optional or conditional on the part of the employer. Medical advisers, members of theatrical establishments, even some descriptions of household servants, may be employed at annual salaries, though no actual service may be ever required. It is not those only who are actually called upon to perform duties, but those who are under an obligation to perform them, who are employed.

I think, for the reasons explained in the judgment of the Exchequer Chamber at more length, 6 C. B. 177, and in the appendices on both the cases of the plaintiff and defendant in error, that we ought to understand this expression in that sense of the word "employ" which will support it; and "employ," therefore, means only "to retain" in the service, and is mere tautology. The distinction is very important indeed, between an agreement to retain and employ, in the sense before referred to, for a given term, and then to pay for services, at the end of the term, a sum certain, and simply to pay a sum certain for services at the end of a given term. In the former case the person employed has an immediate remedy, the moment he is dismissed without lawful cause, for a breach of the contract to retain and employ, and will recover an equivalent for the breach of the employer's contract, which may be less than the stipulated wages payable at the end of the term, if it happens that he has the opportunity of employing his time beneficially in another way, and the employer is not bound to pay the whole agreed sum. But in the latter case — that is, if the agreement is, that the person retained is to be paid a certain sum for his services at a certain time, provided he serves, there being no contract to retain and employ during the term — he can only maintain an action, after that time has arrived, for non-payment, and then is entitled to recover the full amount, though his loss may be much less. The convenience is decidedly in favor of construing such agreements to be contracts for retaining, as well as for the payment of wages.

There are certainly cases where, in construing contracts between the employers and the employed, where payments at certain times are stipulated to be paid for services, the court has not been able to

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put such a construction upon them, and where they have held that the contract imported only an agreement to give certain sums at certain times. Two cases of this description, cited in the Court of Exchequer Chamber, and at your lordships' bar, and much relied upon, were those of *Aspdin v. Austin*, 5 Q. B. 671, and *Dunn v. Sayles*, Ib. 685. Both these are clearly distinguishable. In the former, the question turned upon the construction of a contract on the part of the plaintiff, to make cement for the defendant, and one Sealey, and to teach them how to do so, and on the defendant's and Sealey's part to pay a weekly salary for three years; and the point was, whether there was an implied contract to continue to employ him to manufacture cement for that period. The court could not draw that inference, and Lord Denman, C. J., in giving judgment, assigns a very strong reason for refusing to do so, namely, that the defendant would, in that case, be obliged, at however great loss to himself, to continue his business for three years. The court, therefore, construed the contract to be a contract only to pay sums at the stated periods for three years, on condition of the plaintiff performing the conditions precedent; and he would be entitled to recover them on being ready and willing to perform those conditions, being prevented by the defendant's act from so doing. In the other case, which depended on the construction of the defendant's covenant in an indenture, the term "it was agreed," which would make the stipulation the agreement of both parties, was wanting. It was a simple covenant by the defendant, who, in consideration of the services of the plaintiff's son as an apprentice to the defendant, a surgeon-dentist, covenanted to pay weekly sums for five years. The reasons assigned in the former case equally applied to that, as Lord Denman, C. J., observed; and, indeed, it would be a strong thing to imply that the plaintiff, who had only covenanted to pay certain sums weekly, thereby impliedly covenanted to carry on the business of a surgeon-dentist, at whatever loss or inconvenience to himself, for five years.

A case to the contrary, of a special contract, where the court held that there was an agreement to employ for seven years, was *Pilking-ton v. Scott*, 15 M. & W. 657. In the present case, we have to construe the mutual agreement of two parties expressed in the words of both, and we must assume that we have all the agreement before us, which is the consideration for the mutual promises — one a company for life and fire assurance, and the grant of annuities, which must necessarily have been sure to continue in the contemplation of both parties, at least, whether in fact or not, for a much greater time than a year; the other an attorney, whose advice and assistance would, without doubt, be often required in the conduct of such a business. I feel quite satisfied that in such a case as this, there is, upon the true construction of this agreement, an implied agreement upon the part of the defendants below to retain the plaintiff, and to employ the plaintiff, in the sense in which I understand this word, for one year at least. It is, however, suggested that the purport of the agreement is only to vary the remuneration of the plaintiff, and

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change it from an annual bill of costs to an annual salary, the employment of the attorney being for an indefinite time. I do not think that this can be inferred from the agreement stated in the second count. The annual bill, as well as the annual salary, equally refers to an employment at least for one year; and the agreement in the first count (supposing it could throw any light upon the construction of that in the second) cannot be referred to for that purpose. The question is on the contract in the second count only; and the existence of that in the first count is negatived by the issue on *non-assumpsit* as to that count being found for the defendant. The assessment of damages at the large sum of 200*l.* for the breach of the contract to retain and employ, was mentioned in the course of the argument at your lordships' bar, to show that the word "employ" must have been understood on the trial, in a different sense to that which is attributed to it in the Court of Exchequer Chamber, and held to mean the supplying the plaintiff with business. But this is a mere conjecture. If it be well founded, or the damages are excessive, an application should have been made to the Court of Common Pleas for a new trial. In the present stage of the cause, if the count is sufficient in point of law, the amount at which the damages are assessed is perfectly immaterial. Therefore I think that the second count is good, and that the plaintiff below would be entitled to judgment upon it.¹

The further consideration of the case was then adjourned.

August 12, 1853. Lord Truro now moved the judgment of the House, and, after stating the facts of the case, his lordship proceeded as follows: My lords, it has been contended at your lordships' bar, upon the part of the plaintiff in error, that the construction put by the Court of Common Pleas, on the promise to retain and employ the plaintiff, was consistent with the true legal import of the words, and that no sufficient consideration was averred to support the promise, understood in its proper sense; and the special damage alleged was referred to as furnishing proof that the pleader had averred the promise to "retain and employ" in the sense which the Court of Common Pleas had attached to it. The special damage alleged, was not only the loss of the salary, but also the loss of the profit which would have been earned by the preparation of securities, and conducting suits and defences. It was further argued, that although the allegation of special damage, which in law was not referable to the promise, or the breach of it, would be mere surplusage, and furnish no matter of objection, yet it might be referred to for the purpose of explaining the sense in which an averment in the declaration, expressed in equivocal words, was intended to be understood. Further: it was contended, that if the promise to "retain and employ" meant no more than to continue the relation of attorney and client for the year,

¹ MAULE, J., was therefore the only judge who answered the question in the negative.

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and to pay 100*l.* salary at the end of the year, then no sufficient breach was assigned; the breaches assigned being, first, the refusal to continue to retain and employ the plaintiff; and, secondly, the refusal to pay the salary.

With regard to the refusal to continue to retain and employ, it was said that such refusal gave no cause of action, because it could occasion no actual or implied damage to the plaintiff, as such continuance to retain and employ him was not necessary to entitle him to the salary of 100*l.*; that it was sufficient so to entitle the plaintiff that he should continue in a situation capable and ready to be employed, if called upon to perform service: and that, in regard to the non-payment of the salary, the non-payment was not averred, but only a refusal to pay, which, it was contended, was not equivalent to an averment of non-payment. And as to the alleged loss of the gain and profit which would have been derived by him for the prosecution and defence of suits, and the preparation of securities, both courts had concurred in the opinion that that agreement did not create any obligation upon the company to furnish such employ, and that it could only be referred to, as before mentioned, to explain that the averment of the agreement by the company to retain and employ, was used in the sense of furnishing the plaintiff with actual employment as attorney.

Upon the part of the defendant in error, it was answered, that the objections urged by the plaintiff in error, were founded upon a misconstruction of the words "retain and employ," which, it was contended, did not import any obligation to find actual work for the plaintiff to do, but only to retain and employ the plaintiff in the sense of continuing the relation between him and the company, of attorney and client for the year; and that the untimely and unjustifiable dissolution of that relation within the year, was a refusal to retain and employ the plaintiff, and gave an immediate cause of action; and that the breach is well assigned by the allegations of the refusal by the company to retain or employ the plaintiff on the terms of the agreement, or to pay him his salary of 100*l.*; and that the special damage averred is immaterial, and could not affect the question whether the promise or the breach is well pleaded. The case, therefore, resolved itself into the question, what is the legal import of the averment that the company promised to perform the agreement, and to retain and employ the plaintiff for a year upon the terms of the agreement; whether the words import a contract beyond the strict legal effect of the agreement itself? If they do not, the mutual promises to perform the agreement, are a sufficient legal consideration to sustain the count. Your lordships were, therefore, pleased to put the question to the learned judges, "whether the plaintiff would be entitled, after verdict, to judgment in the courts below, upon a count in the form of the second count set out in this record." Eight of the learned judges have stated their opinion to be, that the plaintiff would, in the courts of law, be entitled, after verdict, to judgment upon a count in the form of the second count set out in the record; one of the learned judges expressing a contrary opinion. The case now

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remains for your lordships' judgment; and although I am strongly impressed by the reasons assigned by the learned judge, whose opinion is adverse to the validity of the count, and I should myself have been well content to have acted upon that opinion, yet I think, that from the respect due to the opinions of the other learned judges, and to the reasons by which those opinions are supported — considering the question to be one of construction and pleading, with which those learned judges are peculiarly conversant — I cannot but advise your lordships that the safer course will be to act upon the opinions of the eight learned judges, and to affirm the judgment.

I cannot, however, omit to observe, that the record furnishes strong grounds for believing that the sense which the single learned judge whose opinion is against the validity of the count has ascribed to the promise to retain and employ is the sense in which the averment was intended to be understood — that is, that the agreement created an obligation on the company, not only to perform the agreement by retaining the plaintiff for a year, as the attorney and solicitor of the company at the salary of 100*l.* a year, but also to retain and employ him to prepare the securities referred to, upon the terms of being paid professional charges in those respects; and the judge at *Nisi Prius* must have so construed the promise, as the plaintiff actually recovered damages for the breach of the agreement in that sense, although the declaration is now held valid only because the eight learned judges reject that construction. That the pleader inserted the averment in the repudiated sense is apparent from the form of the breach assigned; because, after alleging a breach of the agreement by the company in dismissing the plaintiff, and refusing to employ him as attorney and solicitor for the company for a year, or to pay him his salary, the declaration alleges that he was thereby deprived of his salary of 100*l.*, and was also deprived of the gains and profits which he would have derived from such employment, in and about prosecuting and defending of divers suits respectively brought by and against the company, and in and about the preparing of divers bonds, contracts, and securities for the company. And further, the declaration alleges that part of the salary of 100*l.* had been paid before the commencement of the action, and that the plaintiff's claim to damage was limited to the amount of the balance of the salary of 100*l.* if the promise was only to retain and employ for a year at a salary of 100*l.*; yet the plaintiff has obtained a verdict for 200*l.* damages, to which he could only be entitled provided the promise alleged in the declaration enured as a promise, not only to retain the plaintiff for a year at 100*l.* salary, but also to furnish him with additional profitable employment. It is possible, however, that the pleader might contend that the allegation of a promise to retain and employ was used only to explain that the promise to perform the agreement was, in legal effect, a promise to retain and employ the plaintiff as the attorney for the company for a year; and that the special damage, by the loss of the profit of prosecuting and defending actions and of preparing securities, meant only that the plaintiff, by his dismissal from the service of the company, lost that probable chance of employment to prosecute and de-

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fend suits in which the company should be a party, and of preparing securities, which he would have enjoyed if he had been continued in the service of the company for the year; and that the jury were warranted in adding to the balance due in respect of his salary some damages by way of indemnity for the loss of that contingent employ, which was incidental to his character of attorney for the company.

The case, however, has not been presented in that view, and the cause is now before your lordships in the position of the record containing a contract ambiguous in its terms, which being understood in the sense in which alone the plaintiff would be entitled to a judgment in his favor, his right to damages could not amount to 100*l.*; and he has recovered a verdict and costs for a judgment for 200*l.* damages, to which he could alone be entitled provided the contract averred is to be understood in the sense which the plaintiff repudiates, and which the eight learned judges say cannot legally be ascribed to it. Injustice, therefore, has manifestly been done. Your lordships can afford no relief against that injustice; but I should have thought that for such an incongruity upon the face of the record some remedy might have been found, either by a venire de novo, if the plaintiff refused to remit the amount of the excess of damage, or by some other means; and unless the Court of Common Pleas can exercise a summary jurisdiction in staying the proceedings, upon payment of the balance of 100*l.*, salary and costs, the justice is irremediable. Your lordships cannot, I think, do otherwise than affirm the judgment, because it is a clear rule of law, that if a declaration contains allegations capable of being understood in two senses, and if understood in one sense it will sustain the action, and in another it will not, after verdict it must be construed in the sense which will sustain the action.

Judgment of the Exchequer Chamber affirmed.



GREY and others, Plaintiffs in Error, v. FRIAR, Defendant in Error.¹

June 21, July 4, and August 5, 1853.

Lease — Power to determine — Covenants — Condition precedent.

A mining lease for a term of forty-two years contained numerous covenants on the part of the lessees, some of which were of very minor importance, and almost impossible to be fulfilled; and it contained a proviso, that if the lessees, &c., should be desirous to quit the premises at the end of the first eight years of the term, or at the end of the first or any

¹ Before the Lord Chancellor, (Lord CRANWORTH,) Lord BROUGHAM, and other Lords. The judges present at the argument were PARKE, B., PLATT, B., ALDERSON, B., and MARTIN, B.; COLERIDGE, J., WIGHTMAN, J., WILLIAMS, J., ERLE, J., CRESSWELL, J., TALFOURD, J., and CROMPTON, J.

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subsequent three years after the expiration of the said eight years, and of such desire give eighteen calendar months' notice in writing, &c., "then and in such case, (all arrears of rent being paid, and all and singular the covenants and agreements on the part of the said lessees having been duly observed and performed,) this lease, and every clause and thing herein contained, shall, &c., cease, determine, and be utterly void, to all intents and purposes, in like manner as if the whole of the said term of forty-two years had then run out and expired, but, nevertheless, without prejudice to any claim or remedy which any of the parties hereto, or their respective representatives, may then be entitled to for breach of any of the covenants or agreements hereinbefore contained : " —

Held, following the opinion of the majority of the judges, and affirming the decision of the Court of Exchequer Chamber, which reversed that of the Court of Exchequer, that the performance of all the covenants by the lessees was a condition precedent to their right to determine the lease.

THIS was a writ of error upon a judgment of the Exchequer Chamber, reversing a decision of the Court of Exchequer in an action of covenant by the defendant in error, as assignee of the reversion, against the plaintiffs in error, as lessees of a colliery, for rent alleged to be in arrear. The defence set up was, that before the rent fell due, the lease was put an end to by written notice, pursuant to a condition in the lease, upon the construction of which the case turns. That condition was in the following words — that is to say : " Provided also, that if the said lessees, their executors or administrators, shall be desirous to quit the said premises hereby demised at the end of the first eight years of the said term, or at the end of the first or any subsequent three years after the expiration of the said eight years, and of such their desire shall give to the said John Friar, his heirs or assigns, notice in writing eighteen calendar months before the expiration of such eighth year, and thereafter before the expiration of any such three years, (as the case may be,) then, and in such case, (all arrears of rent being paid, and all and singular the covenants and agreements on the part of the said lessees having been duly observed and performed) this lease, and every clause and thing herein contained, shall, at the expiration of the first eighth year, and thereafter at the expiration of any such third year, (whichever in the said notice shall be expressed,) cease, determine, and be utterly void, to all intents and purposes, in like manner as if the whole of the said term of forty-two years had then run out and expired, but nevertheless without prejudice to any claim or remedy which any of the parties hereto, or their respective representatives, may then be entitled to for breach of any of the covenants or agreements hereinbefore contained." The plaintiff below, in answer to the plea that the lease had been so determined, replied that the defendants below, had, before the expiration of the notice, committed a breach of covenant, which was continuing at the time when the notice expired. To that replication, the defendants below demurred, and the plaintiff below joined in demurrer. The case was argued in the Court of Exchequer on the 5th and 8th June, 1850, and on the 8th July, in the same year, the Court of Exchequer, in conformity with the opinion expressed by the Court of Exchequer Chamber in a former action between the same parties, (reported 14 Jur. 1105,) gave judgment for the defendants below, now plaintiffs in error. The case before the Court of Exchequer is reported in 5 Exch. 584. A writ of error

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was brought upon that judgment, and after argument on the 16th May, 1851, the Court of Exchequer Chamber, on the 19th May, in the same year, reversed judgment of the Court of Exchequer, and gave judgment for the plaintiff below, the defendant in error. That judgment is reported in 5 Exch. 597, and 5 Eng. Rep. 484. The important clauses of the lease, together with the pleadings, are fully set out in the previous report, 5 Eng. Rep. 484.

Hill and Willes, for the plaintiffs in error.

Bramwell and Manisty, for the defendant in error.

The arguments were identical with those urged on the former hearing.

The following cases and authorities were cited: *Porter v. Shephard*, 6 T. R. 665; *Dawson v. Dyer*, 5 B. & Ad. 584; *Lister v. Lobley*, 7 Ad. & El. 124; Roll. Ab., "Condition," T., pl. 11; Com. Dig., B. 1; Shep. Touch. 122; *Boone v. Eyre*, 2 W. Bl. 1312; *Hunlock v. Blacklowe*, 2 Wms. Saund. 155 b; *Stavers v. Curling*, 3 Bing. N. C. 355; *Kemble v. Farren*, 6 Bing. 141; *Horner v. Flintoff*, 9 M. & W. 678; *Hay v. Bickerstaffe*, 2 Mod. 34; *Warren v. Asters*, T. Jones, 205; *Simpson v. Titterell*, Cro. Eliz. 242; *Doe v. Bancks*, 4 B. & Al. 401; *Scott v. Avery*, (lately before the Common Pleas, not reported;) *Davies v. Penton*, 6 B. & Cr. 216; *Saward v. Anstey*, 2 Bing. 519; *Hesse v. Stevenson*, 3 B. & P. 574; and *Thornhill v. Hall*, 2 Cl. & Fin. 22.

At the conclusion of the arguments, the following question was put to the judges:—

"Whether, on this record, judgment ought to be given for the plaintiffs in error, or the defendant in error?"

PARKE, B., on behalf of the judges, requested time to consider the case.

July 4. The learned judges now attended, and delivered their reasons, as follows:—

MARTIN, B. In answer to the question proposed by your lordships to the judges, I have to state, that in my opinion, on this record, judgment ought to be given for the plaintiffs in error. The declaration was in covenant upon a lease, dated the 30th April, 1838, of a colliery and certain lands, in the county of Durham, for a term of forty-two years from the 12th May, 1838, at a rent of 280*l.* certain, and the plaintiff sought to recover 700*l.*, being two and a half years' rent, due on the 11th November, 1849. The lease being set out on oyer, the defendants pleaded that, by virtue of a proviso contained in the lease, they had put an end to it on the 12th May, 1846, by a notice. The plaintiff replied, that the defendants had broken a covenant in the lease, by not pumping water out of the mine. To this replication there was a demurrer; and the question between the

parties is, whether the performance of the covenants contained in the lease was a condition precedent to the determination of the lease by the lessees under the proviso in question. I am of opinion that it was not. The proviso upon which the question depends is this: "That if the lessees shall be desirous to quit the premises demised at the end of the first eight years of the term, or at the end of any third year afterwards, and shall give the lessor eighteen calendar months' notice of such desire, then, and in such case, (all arrears of rent being paid, and all and singular the covenants and agreements on the part of the lessees having been duly observed and performed,) the lease, and every clause and thing therein contained, shall, at the expiration of the eighth year, &c., cease, determine, and be utterly void, but nevertheless without prejudice to any claim or remedy to which any of the parties might then be entitled for breach of any of the covenants or agreements contained therein." This is the substance, indeed nearly the words, of the sentence; and it is clear, that, notwithstanding the determination of the term by the lessees, it was contemplated by the parties that the lessor might have a then existing cause of action against them for breaches of covenant, for the concluding words are for the express purpose of protecting this right; but this appears to me inconsistent with the contention on behalf of the defendant in error, for according to it the precise observance of all the covenants is a condition precedent to the lawful determination of the term at all, and if a single one of these covenants had ever been broken, the power of the lessees to determine it was absolutely gone.

It has been said that these concluding words are for the purpose of securing to the lessor the right of action upon the covenants, should it be discovered that they had been broken after he had acted upon the notice to determine given by the lessees. They are quite unnecessary for this purpose, for the right of action would exist without them; but when it is considered that the notice required by the proviso is for so long a period as eighteen months, it does not occur as likely that a want of knowledge as to the performance or non-performance of the covenants at the time of the determination of the lease was contemplated. It seems to me that the more reasonable mode of construing this proviso is, to hold that the lessees are at liberty absolutely to put an end to the term at the expiration of the eighth year, but that nevertheless they shall remain and be liable for any breaches of covenant which they may have committed, and that upon payment of all arrears of rent, (the word "arrears" itself indicating a breach of the covenant to pay the rent,) and all the covenants being observed and performed or satisfied, then that not merely the term itself, but all the obligations created by the covenants in the lease, shall cease and be at an end. This construction, *reddendo singula singulis*, gives effect to every word in the sentence, and, as I think, is a fair and reasonable construction of it. But assuming that there is a difficulty in giving it this construction upon the mere words of the proviso itself, there can be no doubt, I apprehend, that it was the intention of the parties that the lessees should have the power of determining

the lease at the end of the first eight years of the term, and that this was meant to be a real power, and not a merely delusive one. Now, looking at the covenants contained in the lease on the part of the lessees, if the performance of these covenants be held to be a condition precedent to the power of putting an end to the lease, it is to my mind absolutely certain that the power could never be exercised at all. The slightest deviation from any covenant would put an end to the power; for instance, their having in tillage more than the prescribed quantity of land, the not summer-fallowing the precise number of acres specified, the not ploughing this fallow five times, however unfit and improper it might be to do so, in consequence of a wet season, the not laying upon every acre the precise specified quantity of lime, (there being covenants in the lease as to all these particulars,) would, upon the construction contended for on behalf of the defendant in error, absolutely extinguish the power of determining the lease. There is also a covenant that after the harvest next preceding the expiration or sooner determination of the term the lessees should keep uneaten and free from trespass all the land on which grass seeds had been sown with the crop next preceding. Now, supposing the lessees had, eighteen months before the expiration of the first eight years, given a notice, perfectly valid in every respect, of their desire to put an end to their interest, and had always paid the rent upon the very days when it became due, and had actually performed and fulfilled every covenant in the lease, yet if, upon the day next before the expiration of the eight years, the cattle of a neighbor had come over the fence and trespassed upon the land on which the grass seeds had been sown, then, according to the argument on behalf of the defendant in error, the power to determine the lease was gone, and the lessees would thereby become absolute tenants for the entire period of forty-two years. I cannot think that this was the real intention of the parties.

The rule laid down by Williams, Sergt., in his note to *Pordage v. Cole*, 1 Wms. Saund. 320 b, which I have always understood to be the ruling authority upon the subject, is, that questions of this kind are to be decided according to the intention and meaning of the parties and the good sense of the case, and that technical words should give way to such intention. And it certainly seems to me that good sense dictates that a construction should be avoided which practically renders a determination by the lessees of the lease an impossibility; and that it is more reasonable that the power to determine it should be deemed unconditional, whilst at the same time there is secured to the lessor the full and entire protection of the covenants in his favor until they are all either fully performed or satisfied. The case of *Hay v. Bickerstaffe*, 2 Mod. 34, seems also to be strongly in favor of the plaintiffs in error. In a subsequent part of the lease declared on there is a covenant on the part of the lessees that it shall be lawful for them, they well and truly paying the rent at the appointed days, and performing all and singular the covenants and agreements on their parts to be kept, observed, and performed, (but not otherwise,) peaceably and quietly to enjoy the premises demised. I cannot distinguish

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between the words in this covenant and the words in the proviso; indeed, if any thing, the words in the covenant seem to me more directly to make the payment of rent and the performance of the covenant a condition precedent to the obligation of the covenant attaching, for the words "but not otherwise" occur in it, and not in the proviso. Nevertheless, in *Hay v. Bickerstaffe*, the court held that the words "on payment of rent and performance of covenants" did not render the performance of these acts a condition precedent to the covenant for quiet enjoyment attaching, but that the covenant was absolute; and this case, I believe, has been acted upon ever since its decision.

The judgment of the Court of Common Pleas in *Stavers v. Curling*, 3 Bing. N. C. 355, is also, in my opinion, in favor of the plaintiffs in error. The master of a ship had bound himself to the performance of a great many terms and conditions, and the owner covenanted that on the performance of the terms and conditions he would pay the plaintiff a certain proportion of the net produce of the profit of the adventure. The Court of Common Pleas were of opinion that the performance of the terms and conditions was not a condition precedent. Tindal, C. J., in delivering the judgment, says: "If the matter was *res integra*, the argument would undoubtedly be strong; but *Boon v. Eyre*, the leading case on the subject, (the case relied on by Williams, Sergt., in his note,) the distinction was first clearly established. The defendant there covenanted, that the plaintiff well and truly performing all and every thing in the deed contained on his part to be performed, the defendant would pay an annuity; and it was held that the performance by the plaintiff of his covenants was not a condition precedent." And the chief justice proceeds to say, "that courts of justice are more anxious to discover and be governed by the intention of the parties than to follow the strict and technical form of words used in the instruments."

The case of *Porter v. Shephard*, 6 T. R. 665, was strongly relied upon on behalf of the defendant in error, as being conclusive in his favor. There can be no doubt that it is perfectly competent for parties, if they think fit, to render the strict performance of all the covenants in a lease, a condition precedent to a power by the lessee to determine it by a notice; but I own I very much doubt whether the words in the proviso in question, assuming the concluding part as to the preservation of the right of action in respect of the broken covenants not to exist, are sufficient for the purpose. I do not think the argument of Mr. Wood received sufficient attention from the court; and I am disposed to think that the same principle which prevents a sum of money being treated as liquidated damages, when it extends to a variety of minute breaches of contract, would also prevent such general words as the present, from being deemed to create a condition precedent, when the slightest breach of one of a very great number of covenants (some of very trifling consequence, indeed,) would extinguish so valuable and important a power as that of the determination of the lease. I should be inclined to say that, under such circumstances, the parties had not used sufficiently apt words, and

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not sufficiently expressed their intention to this effect. For these reasons, I think that upon this record judgment ought to be given for the plaintiffs in error.

CROMPTON, J. This was an action of covenant to recover rent, alleged to be due on the lease of a coal mine. The defendants below having pleaded that the tenancy had been determined by them under a proviso enabling them to determine the lease by notice at the end of eight years, the plaintiff replied, showing the non-performance of certain covenants; and the question arose, whether, on the true construction of the proviso, the performance of the covenants was or was not a condition precedent to the determination of the term. Whether particular words do or do not amount to a condition precedent must be gathered from the real intention of the parties, as appearing upon the whole instrument. If such intention is apparent, the parties must be bound by the bargain which they have chosen to enter into; but in ascertaining the meaning and true construction of the deed, it is by no means unimportant to observe what the effect of the construction, one way or the other, would be. Accordingly, the counsel for the plaintiffs in error, in their argument, pointed out the multiplicity and minute nature of the covenants contained in this lease, and argued, from the impossibility of performing all of them to the letter, that the parties were not likely to have intended that the benefit of this clause was to be lost to the lessees by the infraction of any of the numerous and minute covenants. A proviso of this kind being for the benefit of the lessees, and being one in its nature to be useful only when the lessees desire to put an end to their lease against the will of their lessor, it seems hardly likely that the arrangement should be such as to leave it practically in the power of the lessor to say whether the lessees should ever be able to avail themselves of it or not. I quite agree with what was said in the Exchequer Chamber, that these reasons would not justify the court in refusing to put the construction upon the words which they plainly require; but they appear to me to be important in ascertaining what that construction is, and whether the words do not really bear a construction which would not lead to consequences which the parties were not likely to have contemplated. Words capable of being treated as conditions precedent to rights of action, have in many cases, some of which were cited at the bar, been construed as not amounting to conditions precedent, by looking at the provisions of the whole deed as assisting to ascertain the meaning and construction of the particular expressions; and words of this nature cannot be said necessarily to amount to conditions precedent, as they are not construed to do so when they occur in the common case of covenants for quiet enjoyment.

It was said, on behalf of the plaintiff below, that he might reasonably have wished to guard himself, and that he had guarded himself, by words of express condition, against being left, on the determination of the term, with the covenants broken, with the property out of repair, and with the rent unpaid; and several arguments founded

upon different parts of the deed, and upon the probable intentions of the parties, to be collected from the whole deed, were insisted upon at the bar for each party; and the question now is, what is the construction to be put upon the proviso in question, occurring in a deed containing the stipulations relied upon by the respective parties? The words of the proviso are: "Provided, also, that if the said lessees, their executors or administrators, shall be desirous to quit the said premises hereby demised at the end of the first eight years of the said term, or at the end of the first, or any subsequent three years after the expiration of the said eight, and of such their desire shall give to the said John Friar, his heirs or assigns, notice in writing, eighteen calendar months before the expiration of such eighth year, and thereafter before the expiration of any such three years, (as the case may be,) then, and in such case, (all arrears of rent being paid, and all and singular the covenants and agreements on the part of the said lessees having been duly observed and performed,) this lease, and every clause and thing herein contained, shall, at the expiration of the first eighth year, and thereafter at the expiration of any such third year, (whichever in the said notice shall be expressed,) cease, determine, and be utterly void, to all intents and purposes, in like manner, as if the whole of the said term of forty-two years had then run out and expired; but, nevertheless, without prejudice to any claim or remedy which any of the parties hereto, or their respective representatives, may then be entitled to, for breach of any of the covenants or agreements hereinbefore contained."

To make out that this was a condition precedent, the case of *Porter v. Shephard*, 6 T. R. 665, was relied on. In that case, words nearly similar to those in the commencement of the proviso in the present case, were held to amount to a condition precedent. There were, however, in the proviso in that case, no words contemplating that the covenants might be broken, and yet the term be determined by the notice; whilst, in the present case, I find it stated what is to take place in the case the covenants have not been performed, although the term has been determined by the notice. It seems to me impossible to say that the words clearly show that the performance of the covenants is to be a condition precedent to the determination of the term, when there are provisions, though probably unnecessary ones, for recovering damages for prior breaches of covenant in case of the lease determining by notice. On reading the whole proviso together, including the clause beginning "but nevertheless," it will be found that the events of the covenants having been duly performed, and of their not having been duly performed, are both contemplated, and that the clause provides for each of these cases. It says, "that if the notice shall be given, then and in such case (all arrears of rent being paid, and all and singular the covenants and agreements on the part of the lessees having been duly observed and performed) this lease, and every clause and thing herein contained, shall (at the expiration of the notice) cease, determine, and be utterly void, to all intents and purposes, in like manner, as if the whole of the term had run out and expired." This contemplates the case of the due performance of the

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covenants; and in that event, "this lease, and every clause and thing herein contained, are to be void." It seems, then, to have occurred to the minds of the parties, that there may be covenants broken at the time of the expiration of the notice, and that it would not be proper that in such case the lease and all the clauses should be utterly void, as they have stipulated that they should be on the other contingency. What, then, is to be collected from the words they use as to their intention in such a case? Is it that the lease is not to be determined, and that the proviso is to be lost to the lessees? It seems to me that such cannot have been their intention, for they say, "but nevertheless, without prejudice to any claim or remedy which any of the parties may then"—that is, at the time of the determination of the lease—"be entitled to, for breach of any of the covenants or agreements hereinbefore contained"—these being, as was stated in the argument, covenants on the part of the lessees. The effect seems to me to be, if all the covenants are duly performed, the term is at an end; the lease is waste paper, and the clauses are all void; but if the covenants have been broken, the parties do not say that the term is not to be ended, but they make other provisions, and say that the clauses containing the remedies for such breaches to which they are then entitled, notwithstanding the determination of the term, shall still continue. It is not said that in such case the term shall not cease, but that in such case there shall be a right of action, and that the clauses in question for that purpose shall still be in existence. The word "nevertheless" appears to me to mean "although the lease is determined;" and I can give no other effect to the expression, "but nevertheless without prejudice," &c., except by supposing that the lease is to be determined, notwithstanding some covenants have been broken. The words "but nevertheless," &c., seem to me to say the lease shall terminate as in the former case; but in the case of any of the covenants having been broken, such covenants, and the clauses relating thereto, shall remain in force.

The suggestions which have been made in answer to the argument arising on the effect of the latter part of this proviso do not appear to me to be satisfactory. I think, that in a stipulation apparently framed to meet the case of claims and remedies for all breaches of covenant then existing, it is hardly probable that the parties were considering such cases as those of the lessor having acted on the notice, or assented to the determination of the lease by acceptance of the notice, either in ignorance of the breaches of covenant, or meaning to waive them. I do not think that the stipulation is properly explained as referring to the rights of the lessees, as it distinctly applies and refers to the claim and remedies of any of the parties, and as the covenants mentioned in the early part of the proviso, as "the hereinbefore-mentioned covenants" are almost entirely, if not altogether, covenants on the part of the lessees. Nor do I think that the stipulation has reference only to breaches of some of the covenants, which it was said might be committed after the determination of the term; as I think that the words, "to any claim or remedy which any of the parties may then be entitled to for breach of any

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of the covenants hereinbefore contained," distinctly refer to breaches committed before the determination of the lease. The stipulation being general as to breaches of covenant, and applying to all breaches as to which a claim might be subsisting, I see no reason to suppose that the parties were referring to cases only, which appear to me to be far-fetched, and not the ordinary cases likely to occur, or to have suggested themselves to the minds of the parties as being necessary to be provided against; whilst I think it very likely that if the parties intended the term to be determined by the notice, notwithstanding the breach of the covenants, they would have thought it worth while, after saying that if the covenants were performed the lease and all clauses should be void, to add that they should not be void as to bygone breaches of covenant, especially as at one time doubts seem to have been entertained as to the right to sue after the determination of the lease. When so many learned persons have taken different views of this case, it would ill become me to express any confident opinion; but not being satisfied that the parties intended to make the performance of the covenants a condition precedent, when they clearly appear to me to have contemplated that the lease might be determined though the covenants had been broken, and not being satisfied with the explanation of the stipulation at the end of the proviso suggested on the part of the plaintiff below, I think that I ought to answer your lordships' question by saying, that in my opinion the plaintiffs in error, the defendants below, were entitled to the judgment as pronounced in their favor by the Court of Exchequer.

TALFOURD, J. In reply to your lordships' question, whether on this record, judgment ought to be given for the plaintiffs in error, or for the defendant in error, I humbly submit my opinion that the judgment ought to be given for the defendant in error. The question on which the judgment depends is raised by a demurrer to the replication in an action of covenant, brought by the defendant in error, against the plaintiffs in error, for non-payment of rent alleged to have accrued during the continuance of a term of forty-two years, created by the lease of a coal mine. By the plea, which sets out the indenture on oyer, it appears that the instrument contains the following proviso:—

[The learned judge here read the proviso, and continued:—]

The plea then alleges a notice under this proviso by the lessees to determine the lease at the end of the first eight years, whereby, all arrears of the rents having been paid, and all the covenants and agreements on the part of the lessees having been duly observed and performed, the lease ceased, determined, and became void before the accruing of the rents for non-payment of which the action is brought. The replication alleges that the covenants on the part of the lessees were not duly observed and performed at the expiration of the eighth year; but that, on the contrary, the lessees neglected to drain the mine, by reason whereof the mine became drowned and overburdened with water, and that such breach of covenant was continuing

at the expiration of the eighth year. The demurrer to this replication raises the question whether the notice of the defendants was effectual to work the determination of the lease, notwithstanding a breach of one of the lessees' covenants committed and continuing at its expiration.

The consideration of this question involves a choice of difficulties, arising from an apparent conflict of two clauses placed by the framer of the lease in juxtaposition, by the first of which it would seem that all the covenants of the lessees must be performed before its avoidance; while the last purports to reserve, notwithstanding its avoidance, remedies to each party for breach of such of the covenants as precede the proviso. It will be convenient first to consider the import which the first clause would bear if standing alone, and secondly, to inquire how far such import is affected by the subsequent words. Now, on the first view of the case, it can scarcely be contended that the performance of the lessees' covenants must not be regarded as a condition precedent to the avoidance of the lease. The words are similar to those construed in the case of *Porter v. Shephard*, except, that in that case the precedence of the condition is indicated by the use of the words "from and after" applied to the avoidance, and in this case by the use of the past tense, "having been," in the corresponding position. If the words have not this meaning, it seems scarcely possible to attach to them any meaning at all. The only suggestion offered is, that they may be intended to qualify the avoidance of the lease, so as to prevent an apprehended destruction of the remedies arising out of it; that although the lease was to be determined absolutely at the end of the notice, it was only to be void, as the foundation of rights of action, when its covenants were fulfilled. But if so read, there would be no provision whatever for the determination of the term, apart from the perfect avoidance of the lease on the performance of the covenants, unless the first clause be taken from its position, and interpolated between words which are obviously mere cumulative expressions to denote the same thing, and would then be read thus: "Then and in such case this lease shall, at the expiration of the eighth year, &c., determine and (all arrears of rent being paid, and all and singular the covenants on the part of the lessees having been duly observed and performed,) be utterly void, to all intents and purposes, in like manner as if the whole term of forty-two years had run out and expired"—a transposition singularly violent. It may be that the introduction of the analogy between the determination by notice and efflux of time is not necessarily fatal to this supposition, as the parties, who probably thought that words of entire avoidance of the lease might prevent the continuance of a remedy by action, may possibly have thought such to be the law when leases expire by efflux of time; but if they so thought, they have expressly provided against this imaginary mischief by the clause which follows, and which is perfectly apt for that purpose. Having reference, therefore, to these words themselves, and to their position by way of introduced parenthesis in the very body of the clause, which gives to the notice its desired force, I can see no ground of

doubt that they form a condition precedent to the determination of the term, by the exercise of the option given to the lessees.

It has been argued, that the covenant for quiet enjoyment, which is clearly an independent covenant, is expressed in similar terms; but this is otherwise, for the words applied to that covenant are present, not past — “paying the rents and performing the covenants;” which words are expounded by the proviso of reëntry itself, which refers to the covenant for quiet enjoyment, and provides, that in case of any of the enumerated breaches, the covenant for quiet enjoyment shall cease and be void. It has also been argued, that the perfect performance of all the covenants on the part of the lessees is so difficult as to border on impossibility, and that therefore it is unreasonable to suppose it to have been contemplated as a condition precedent to the exercise of an option which it would render worthless. It has been answered, that this objection would apply to the ordinary proviso for reëntry, which, if strictly acted on by the lessor, and practically enforced by juries, would render every lease containing it determinable at the lessor’s pleasure; and this, although the analogy is not perfect, may well illustrate the species of confidence which persons who take leases habitually place in their lessors, that they will not vexatiously use the customary powers they insist on. But the truth probably is, that in the framing of the proviso in question, the parties did not intend to use the words “duly observed and performed” in their technical sense, as importing that no covenant during the eight years or longer period had ever been broken — in which sense they are certainly unreasonable — but in a sense in which they import a condition perfectly natural and just, namely, that before the expiration of the notice, the objects of the covenants should be attained — that is, that the works should be put into repair, the water pumped out of the mine, and every thing done which the lessees were bound to do in order that they might deliver up the premises in a proper condition to their landlord. The great length of the period of eighteen months provided for the currency of the notice seems intended for such a purpose; and if this was the intention of the parties, it was more reasonable than the position alleged by the lessees, that they should be at liberty to throw the mine on the hands of the lessor in such a state as the replication suggests, only leaving to the lessor a remedy by action for damages. We come now to the words which it must be admitted create a difficulty: “But nevertheless without prejudice to any claim or remedy which any of the parties hereto, or their respective representatives, may then be entitled to for breaches of any of the covenants or agreements hereinbefore contained.” These words have no legal operation or effect whatever, as they merely express, what the law in their absence would secure to the parties, rights of action on a determined lease. Still, although they avail nothing, they must mean something.

To the suggestions made in the judgments of the Exchequer Chamber, that they may be intended to apply to after-discovered breaches, or to an acceptance of the notice by the lessor, notwith-

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standing covenants broken, or to the preservation of the right of the lessees to sue the lessor, may be added, that there are covenants to be performed by the lessees, and claims which may arise under the claim of arbitration, after the expiration of the term. If I might speculate on the cause of the introduction, I should attribute it to some doubt arising in the mind of the framer of the lease, whether there might not arise some case in which the rights of the parties to sue might be improvidently abolished; and thereupon he introduced superfluous words, not pointed to any particular covenant, but large enough to cover any, according to a practice of adding provisos not wholly unknown in the history of modern legislation. If all these explanations should fail, still, I should think that less violence will be done to the language of the lease by regarding the latter words as impertinent and unmeaning, as they are certainly inoperative, than by striking out the former from the very body of the clause which gives the lessees that option on which their defence is based. For these reasons, I think the decision of the Court of Exchequer Chamber is right, and that the judgment should accordingly be for the defendant in error.

ALDERSON, B. This question arises under a lease, dated the 30th April, 1838, whereby the defendant in error, Friar, demised to the plaintiffs in error and another, certain farm lands and collieries for the term of forty-two years, they paying a fixed rent for a certain quantity of coal, whether got by them or not, and another fixed rent for the farm land leased to them, and the claim made by the declaration was for rent in arrear in respect of both these demises. The defendants, the plaintiffs in error, set out the lease, which contained the following covenant for the determination of the lease: [The learned judge here read the proviso, and continued:] They then averred that they had duly given the notice required, and that the term had ceased before the rent now claimed became due. The defendant in error, in his replication, set forth a breach of covenant, and averred that it was still existing at the time of the expiration of the notice, and so that the term remained, and the rent became due. To this there was a demurrer, and the question which your lordships ask the judges is, in substance, whether, under this covenant for the determination of the term by notice, it is a condition precedent that all the covenants and agreements on the part of the lessees shall have been duly observed and performed before their notice to determine the term can have legal effect; and after much consideration, and some hesitation, I have come to the conclusion that this case cannot substantially be distinguished from the case of *Porter v. Shephard*, 6 T. R. 665, and that the performance of these covenants is, notwithstanding the introduction of the latter words in it, made by the lease a condition precedent to the power of the lessees by notice to determine it. It is true that some inconveniences will follow from thus reading this proviso. There are a great variety of covenants in the lease, some more, some less important, and to make the due performance of all a condition precedent to the power of determining the lease is no

doubt to give little effect to it on their behalf. But the words requiring all the covenants on their part to have been performed by them are plain and direct; and the opposite construction labors under a similar difficulty, of giving no effect to words introduced clearly on the behalf of the lessor. If I were to conjecture what the parties really meant, I should say that they perhaps meant to confine these words to the covenants, for the breach of which the lessor was, by the clauses of the lease immediately preceding the proviso, entitled to reënter, and not to all the minute and comparatively unimportant covenants; and that the breach of these was intended to be compensated under the words immediately following, and, as it is said, qualifying the proviso. But however this may be, I do not think these words so qualify the proviso here as to make the plain construction of the words of it other than a condition precedent to the determination by notice. Those words may have effect in giving to the lessor power, even if he accepts the notice, of still bringing actions for antecedent breaches of covenant—a difficulty which was put to the court in *Porter v. Shephard*,—and this acceptance may have taken place in ignorance by the lessor of the breaches of covenant, which would be an additional reason for the insertion of those latter words. But I think that the condition precedent, even taking the words of it, may really mean that covenants broken, if the breach be compensated for before the expiration of notice, shall be considered as covenants duly performed within this proviso. For as rent in arrear, if paid before the expiration of the notice, clearly is within it, so the performance of the other covenants, being found in conjunction with it, may bear the like interpretation. I answer this question of your lordships, therefore, that, in my opinion, this was a condition precedent, and that the replication on this record is a valid replication, and that judgment ought to be given for the defendant in error.

CRESSWELL, J. The question proposed by your lordships in this case depends upon the construction to be put upon a clause introduced by way of proviso in a mining lease. It is unnecessary, in following so many of my learned brethren, to refer to the pleadings, or to the various stages in which this question has been considered in the courts below. The decision upon which the writ of error now before the house was brought was pronounced in the Exchequer Chamber on a writ of error from the Court of Exchequer, when judgment was given for the then plaintiff in error. The proviso is in the following terms: [The learned judge read the proviso, and continued:] According to the opinions expressed both in the Exchequer and Exchequer Chamber, this proviso, if confined to the words already quoted, would have made the performance of the covenants and agreements contained in the lease a condition precedent to the determination of it by notice at the end of the first period of eight years, or any subsequent period of three years; and that it could not be distinguished from *Porter v. Shephard*, 6 T. R. 665. In that opinion I entirely concur; and it seems to me that when the terms of the cove-

nant for quiet enjoyment are compared with the terms of the clause in question, there can be no doubt that the parties intended to create a condition precedent. But it has been argued that the words which follow, "but nevertheless without prejudice to any claim or remedy which any of the parties hereto, or their representatives, may then be entitled to for breach of any of the covenants or agreements hereinbefore contained," qualify the former part of the proviso, and are inconsistent with giving it the effect of a condition precedent, for that assumes that no covenant has been broken, and that therefore no remedy or claim for such breach could exist; and that, it being necessary to give, if possible, some meaning to every part of the lease, the proviso must be so construed as to have something upon which the latter part of it can operate; and that therefore the performance of covenants cannot be treated as a condition precedent to the determination of the lease. But if the former part of the proviso is so worded as to leave no doubt on my mind that the parties intended it to operate as a condition precedent, notwithstanding the addition to it, whereof the meaning may be very doubtful and obscure, I should still think myself bound to give effect to that which remains clear. The latter branch of the clause, however, as it seems to me, is capable of receiving a construction consistent with that which I take to be the plain meaning of the former part. The lessees are to make compensation from time to time for damage of various kinds which may be done to the lessor by the exercise of the privileges conferred by the lease, and if differences arise respecting them, they are to be referred to arbitration. Now, damage may have been done, and the compensation to be made not ascertained at the expiration of the notice, and the latter branch of the clause may have been introduced to keep unimpaired the claim of the lessor. Again: the lessees covenanted to indemnify the lessor against any claim that might be made against him by any of his tenants by reason of any thing done by the lessees. Under that covenant, (although not broken at the expiration of the notice,) the lessor might have a claim to which the latter branch of the proviso would be applicable. It may, therefore, have an operation consistent with that which it is agreed would be the construction of the former branch, had it stood alone. This gives effect to each part, without altering or putting a forced construction upon either. I am therefore of opinion that we are bound so to construe it, and consequently that judgment should be pronounced in favor of the defendant in error.

ERLE, J. I am of opinion that judgment should be given for the defendant in error, on the ground that the performance of the covenants in the lease by the lessees was a condition precedent to the power of determining the lease by notice. The form of words expresses this meaning, according to common understanding: "If the lessees shall give eighteen calendar months' notice before the end of the eighth year, then, all covenants on their part having been performed, the lease shall determine as if it had expired." The same form of words was decided to have this meaning in *Porter v. Shep-*

hard, 6 T. R. 665; and the provision is important to protect the landlord against the fraud or malice of the lessees, who, in the case of a mine, may so work as to obtain in a short time large profit, and destroy the future capabilities for working, and, by bankruptcy, or insolvency, get discharged from the damages awarded for breach of covenant, and by the notice free themselves from further liability during the term; and unless this effect is given to these words they are inoperative. The case for the plaintiffs in error rested mainly on the proviso following this clause, namely, "that in case of the lease being so determined and made void, it is to be without prejudice to any claim or remedy which any of the parties may then be entitled to for breach of any of the covenants in the lease." And it was contended, that if the lease could not be determined unless all the covenants had been performed, the proviso for remedy for breach of covenant in case of such determination would be inoperative; but a sufficient answer, in my judgment, was given to this objection in the court below, that these words may apply either, firstly, to breaches which were not known to the lessor when he took possession of the mine; or, secondly, to breaches which he knew of, but elected not to insist on as conditions precedent to a determination of the term; or, thirdly, to breaches of covenant by the lessor himself. They may also have been intended to obviate an opinion which existed at one time, that the clause making the lease void on a given event, made it void as to breaches of covenant preceding that event; and it seems to me that all or some of these effects are to be given by the proviso, in preference to construing it to take away the effect of a condition precedent from the clause to which it is annexed; under which construction, though it operates to annul the condition precedent, the result is, that each clause neutralizes the other, and the whole instrument is as if neither clause were in it; for upon a proviso for determining a lease by notice, if nothing is said about existing breaches of covenant, the remedy for them is not affected by the determining of the lease.

It is said there would be inconvenience in restricting the power of determining to the event of all the covenants having been performed, which would be almost an impossibility. To this, one answer is, that if the lessor chose so to stipulate, the law must give effect to the stipulation. It may also be answered, that the stipulation does not mean that there should not have been any breach of covenant during the term, but that when the notice expires, there should not exist any cause of action in respect of performance of covenants. The stipulation for arrears of rent being paid, refers to a covenant which had been broken; but all cause of action for the breach, having been satisfied by subsequent accord, the covenant for rent would, within the meaning of this clause, be observed and performed if all arrears of rent were paid before the expiration of the notice. So the covenant for repairs, though broken during the term, would be observed, if all repairs were at last completed. So in respect of other breaches: if the damage had been settled by arbitration, and the amount paid, or if an action had been brought and the judgment satisfied, the legal duty of the covenantor by reason of his covenant, would have been

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so far observed and performed, that all liability in respect thereof would be at an end. In this sense, the stipulation would be free from any hardship towards the lessees, as they might obtain the privilege if they did their duty. This construction does not depend upon giving a peculiar effect to the words of this instrument, for it seems to me that the same principle is applicable to all contracts. The legal effect of the promise in every contract at common law is alternative, either to do the thing promised, or make compensation instead. In some contracts, the alternative is expressed when liquidated damages are stipulated for; in others, the liability arises by implication of law, either to do or to compensate for not doing, according as may be settled by accord, or arbitration, or judgment. In all contracts, the legal duty thereunder has been performed; and so the contract may be said in one sense to be performed when either the thing contracted for has been done, or compensation instead thereof has been made.

WILLIAMS, J. I am of opinion that on this record, judgment ought to be given for the defendant in error. The question is, what did the parties mean by the proviso which gives power to the lessees to determine the lease by notice eighteen months before the end of the eighth year? It is provided that if the lessees shall give such notice, "then and in such case, all arrears of rent being paid, and all and singular the covenants having been observed and performed," the lease is to determine. It is contended, on behalf of the appellants, that this may mean that the lease is to determine by the notice, though the covenants have not been performed. That this construction is contrary to what the parties have said in the lease, can hardly be denied. But it is contended, that if the proviso were construed according to the language, it would be extremely inconvenient, and that this inconvenience, having regard also to the final clause of the proviso itself, justifies a departure in construction from the natural and obvious sense of the words employed. The final clause guards against any prejudice being worked by the determination of the lease to any claim or remedy to which any of the parties may then be entitled for breach of any of the covenants before mentioned; and this reservation to the lessor of a right to sue on broken covenants, is certainly inconsistent with the absolute proposition, that the lease is not to determine if any of the covenants have been broken; and the question is, what effect ought this inconsistency to produce on the construction of the clause which is supposed to contain that proposition? It is said that the due effect of it is, to show that the performance of all the covenants could not have been intended as a condition precedent to the right of determining the lease by the notice. In more untechnical language, this is nothing more or less (as it appears to me) than contending that what the parties have said shall be rejected, inasmuch as they have said that the lease is not to be determined, unless the covenants have been performed. Such an effect ought not to be given to this final clause, if its introduction can in any way be reconciled with the operation of the earlier part of the proviso.

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In order to examine whether this is possible, let the proviso be regarded as if it did not contain the final clause. Then (as it has been laid down in each of the four judgments already delivered in this cause) the authority of *Porter v. Shephard*, as well as the natural and obvious sense of the language, would have left no doubt of the parties having agreed that the lease was not determinable by notice, unless the lessees had performed the covenants. Now, suppose the lessees, after having broken some of the covenants, had duly given notice to determine the lease, which had been accepted by the lessor, either in ignorance of the breaches, or choosing to waive them, and at the expiration of the notice, possession had been delivered up to him, would it have been competent to the lessees to demand the possession to be restored to them on the ground that they had not performed the covenants, and that consequently, the lease was not determinable by their notice, but was still in force? Surely, the answer would have been, that though, according to the terms of the proviso, the notice is to be of no effect, if any covenant shall have been broken, yet it is in the option of the lessor whether he will avoid the notice on that ground. But the question might then arise, whether, having declined to insist on the breach of covenant for the avoiding of the notice, he could be allowed to stand on it as a claim for maintaining an action of covenant; and to put this beyond doubt, a clause might well have been introduced into the lease, that its determination by notice should not prejudice the right to any remedy to which the lessor was then entitled for breach of any of the covenants. It seems to me that in this way the introduction of the final clause in question, may properly be reconciled with the existence of the earlier part of the proviso, construed in the sense that the lease is not to determine by the operation of the notice, if any of the covenants have been broken, and the lessor chooses to avoid the notice on that ground. This construction does not, as it seems to me, further extend the natural meaning of the language, than is done in the familiar instance of a proviso in a lease, that it shall be utterly void, to all intents and purposes, for non-payment of rent, or other breach of covenant, and with respect to which it has been established by the well-known series of cases, commencing with that of *Rede v. Farr*, 6 Mau. & S. 121, that the true construction is, that the lease is not to be utterly void, but voidable only, at the option of the lessor; for that the lessee shall not be permitted to take advantage of his own wrong. See also *Hyde v. Watts*, 12 M. & W. 254. In this view of the proviso, I think that effect may be given to the final clause, consistently with allowing the earlier portion to operate in its natural and obvious sense, as a condition precedent; and consequently that the judgment of the Court of Exchequer Chamber is right.

PLATT, B. The solution of the question proposed by your lordships to her Majesty's judges in this case, depends upon the proper construction of the proviso which has been discussed at the bar. That proviso had been introduced into the lease for the benefit of the lessees, and provided that if they should be desirous to quit the

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demised premises at the end of the first eight years of the term, and of such their desire should give to the lessor, his heirs or assigns, notice in writing, eighteen calendar months before the expiration of such eight years, then and in such case (all arrears of rent being paid, and all and singular the covenants and agreements on the part of the lessees having been duly observed and performed) the lease, and every clause and thing therein contained, should, at the expiration of the first eight years, cease, determine, and be utterly void, to all intents and purposes, in like manner, as if the words of the term of forty-two years had then run out and expired; but, nevertheless, without prejudice to any claim or remedy which any of the parties to the lease, or their personal representatives, might then be entitled to for breach of any of the covenants or agreements thereinbefore contained. Upon this proviso, the plaintiffs in error contend that they and one Johnson, their co-lessee, in his lifetime, having given to the lessor, eighteen months before the expiration of the first eight years, notice of their desire to quit the demised premises at the end of that period, thereby limited their tenancy to the first eight years of the term, and seek on that ground a reversal of the judgment of the Court of Exchequer Chamber. On behalf of the defendant in error, it is contended that the proviso is not absolute, but conditional; and that, unless at the end of the eight years, the rent was paid, and the covenants on the part of the lessees had been duly observed and performed, the tenancy continued. If, therefore, the words, "all arrears of rent being paid, and all and singular the covenants and agreements on the part of the lessees having been duly observed and performed," as used in the proviso, are to be read as constituting a condition precedent, the defendant in error is entitled to judgment. If they are not to be so read, judgment should be given for the plaintiffs in error. The reservation of the claims and remedies to which any of the parties might, in the event of the determination of the lease by the notice, be entitled, introduced at the close of the proviso, is well calculated to render doubtful the intention of the contracting parties. The former case went off upon a question of pleading; and although the inclination of my mind on the present question, was in favor of the present plaintiffs in error, yet upon mature consideration of the provisions of the deed, and the arguments adduced on both sides at the bar of your lordships' house, I cannot surmount the difficulty presented by the learned counsel for the defendant in error, namely, that if the words are deprived of the function of a condition precedent, they do not effect any purpose whatever; they might have been omitted altogether, or instead of them, might be substituted, "although the arrears of rent remained unpaid and the covenants unperformed," without making any difference in the operation of the instrument. I do not think that a court of law would be justified in holding that words which, taken in connection with the context immediately precedent and consequent, possess so decisive a signification, were introduced without a corresponding design. Sir J. Patteson appears to me to have disposed of the reservation of the claims and remedies, in delivering the judgment of the Court of Exchequer Chamber.

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The parties contemplating, as regards the lessor, the possibility of his resumption of possession without being aware of a breach of covenant committed during the eight years by the lessees; and as regards the lessees, the possibility of their having at the expiration of the eight years, a right of action against the lessor, may account for its introduction *abundanti cautela*. For these reasons, I think that the words, "all arrears of rent being paid, and all and singular the covenants and agreements on the part of the lessees having been duly observed and performed," as used in the proviso, constituted a condition precedent; and I answer the question, whether, on this record, judgment ought to be given for the plaintiffs in error or the defendant in error, proposed by your lordships, that, in my opinion, the defendant in error is entitled to your lordships' judgment.

WIGHTMAN, J. In answer to the question proposed by your lordships, my opinion is, that, upon this record, the defendant in error is entitled to judgment. The question in the case is, whether the lessees of the colliery were entitled to determine a lease for forty-two years, at the end of the first eight years of the term, by giving eighteen calendar months' previous notice, though they had been guilty of a previous breach of covenant; in other words, whether the performance by the lessees of the covenants in the lease, was a condition precedent to the right to exercise the power to determine it. This depends upon the construction to be given to the proviso which contains the power to determine the lease. The proviso is in these terms: [The learned judge read the proviso and continued:] The question has been considered in the Courts of Exchequer, Queen's Bench, and Exchequer Chamber, and all have agreed in this, that, except for the words at the end of the proviso, "but nevertheless without prejudice to any claim or remedy which any of the parties hereto, or their respective representatives, might then be entitled to for breach of any of the covenants or agreements hereinbefore contained," the performance of the covenants would have been a condition precedent to the exercise of the power to determine the lease. But it was considered by the Court of Exchequer, and has been urged by the counsel for the plaintiffs in error, that the words in the previous part of the proviso, which of themselves were unambiguous, and would clearly make the performance of the covenants a condition precedent, were so controlled or explained by the words of the latter part of the proviso, that they would not amount to a condition precedent, or indeed, to any condition at all, and that the case of *Porter v. Shephard*, 6 T. R. 665, which would otherwise be a direct authority for the defendant in error, was on that account distinguishable. It is said, on the part of the plaintiffs in error, there is an inconsistency in making the exercise of the power to determine the lease, depend upon a performance of the covenants, if such exercise of the power is to be without prejudice to any claim or remedy by either party, for breach of covenant; as it would be idle and useless to except from the operation of an intermediate determination of the lease, any claim or remedy for breach of covenant, if the lease could only be

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determined in case there had been no breach of covenant; and that, by the construction contended for by the defendant in error, no effect whatever is given to the words in the latter part of the proviso, which it is said would be merely useless. It appears to me, however, that the construction contended for by the defendant in error, is the true construction, and that by it, full effect may be given to every part of the proviso. The lessees alone, are to have the benefit of the power of determining the lease, and it may well be that the lessor would annex to that power the condition of having performed the covenants to entitle the lessees to the benefit of it. The consequence might be, that the most trifling breach of covenant would destroy the power; but this does not appear to me unreasonable, or contrary to the intention of the parties. If the lessees found the strict performance of the covenants too onerous, they might relieve themselves at the end of eight years from further performance, and the lessor might wish to give the lessees an interest in the strict performance of the covenants, by giving them a conditional power to determine the lease only on such performance.

The only difficulty arises from the terms of the clause at the end of the proviso, reserving any claim or remedy the parties may have for breach of covenant. If that clause has the effect contended for by the plaintiffs in error, it would render the words, which are apparently of condition, wholly without object or meaning, though they are perfectly clear and unambiguous, and the condition they apparently introduce is one of great importance to the lessor; whilst, on the other hand, some effect may be given to the clause at the end of the proviso, if the words in the previous part of it were allowed to have the effect of a condition precedent, which is the only effect they can have, unless rejected as mere unmeaning surplusage. The clause at the end of the proviso may well have been introduced from abundant caution, and to prevent, by express provision, any doubt that might arise as to the remedy of the lessees against the lessor for breach of covenants by him in case the lessees chose to determine the lease, they having performed all the covenants. That clause would also apply in cases suggested in the judgment in the Exchequer Chamber, in which the lessor had acted upon a notice to determine the lease, and retaken possession, being ignorant at the time of a breach of covenant by the lessees. It may be observed, that in the covenant for quiet enjoyment, which immediately follows the proviso, the terms used are, "it shall and may be lawful for them, (the lessees,) well and truly performing all and singular the covenants and agreements on their part to be kept, (but not otherwise,) peaceably and quietly to occupy, possess," &c.; whilst in the proviso in question the terms used are, "all and singular the covenants on the part of the lessees having been duly observed and performed," the latter terms indicating a condition precedent, which the words used in the covenant for quiet enjoyment, according to the case of *Hay v. Bickerstaffe*, 2 Mod. 34, and some other cases, would not, unless the addition of the words "and not otherwise" made them so. Upon the whole, it appears to me that, by holding the words "all and singular the

covenants on the part of the lessees having been duly observed and performed" to amount to a condition precedent, effect is given to every part of the proviso; whilst by the construction contended for by the plaintiffs in error, those words, apparently so important, are reduced to mere surplusage, and no effect or meaning whatever is attributed to them; and I therefore think that, upon this record, judgment ought to be given for the defendant in error.

COLERIDGE, J. I am of opinion that on this record judgment ought to be given for the defendant in error. It is agreed that the question turns upon the proper construction to be given to the proviso for the determination of the lease, which has been already more than once read to your lordships, and which, therefore, I need not repeat. It cannot, I think, be disputed that if these words are to be understood in their plain and obvious meaning, they express most unambiguously the intention of the parties to be, that the lessees shall not have the benefit of determining a forty-two years' lease at the end of the first eight years, and subsequently at the end of any three years, unless they have first paid all arrears of rent, and duly observed and performed all and singular the covenants and agreements on their part to be observed and performed. The condition, thus expressed, I think it reasonable to understand, as requiring that the account between the parties must, both as to rent and covenants, be clear: the rent need not have been always paid on the day, but all arrears, if any, must have been paid up; the covenants must have been strictly kept, or, if broken, must have been satisfied for. So understood, the words import a condition precedent neither impossible nor unreasonable; and where that is clearly the case, the mere difficulty of performance, from the number or nature of the covenants to be performed — a fact which must have been perfectly within the knowledge of the parties contracting — seems to me a very unsatisfactory reason for holding it to be otherwise. If the number of the covenants or their nature be in this case a sufficient reason, where is the line to be drawn? What number will be sufficient, or what character will be difficult enough, to show that the parties could not have intended a condition precedent? Or if it be said that here, at all events, the number or nature pass the line which it may be difficult to define, why did the parties, not intending a condition precedent, use language to which, without regard to these considerations, no other meaning could possibly be given? The supposition is, that the lessees, looking at the numerous and difficult engagements they had entered into, could not have intended, and did not intend, to make their power of determining the lease dependent on the punctual fulfilment of them. But how is this to be reconciled with the use of language so unambiguously expressing that intention?

But then it is said — and upon this alone reliance was placed in the Court of Exchequer — that a qualification is added at the end of the proviso, which shows that the language preceding must be understood in some modified sense. What that modified sense is has not been very clearly explained. The qualification is this: "Neverthe-

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less, without prejudice to any claim or remedy which any of the parties hereto, or their respective representatives, may then be entitled to for breach of any of the covenants or agreements hereinbefore contained." This, it is said, is only to come into operation when the power to determine the lease has been acted on; but by the hypothesis it can only be acted on if all the covenants have been performed, and then it will be unnecessary. Now, assuming that it were unnecessary, it would seem to me a very insufficient reason for doing violence to language so plain as that we have been considering; for it is surely not a very uncommon thing to find in leases or other documents provisions introduced from over anxiety or caution which are not strictly necessary. But whether we consider the words in question a condition precedent or not, I apprehend this clause is equally unnecessary. Suppose the lease determinable by notice, though any or all the covenants are broken, and it is so determined, yet it is only determined "in like manner as if the whole of the said term of forty-two years had then run out and expired," in which case, without this provision, the lessees might still be sued on the lease for any precedent breaches of covenant; but if the saving be unnecessary equally if you read the proviso in a non-natural sense, as if you read it in its natural sense, how can its insertion be an argument against reading it in the latter, rather than in the former?

Looking at the instrument by the light of common sense, it is easy enough to see why the saving was introduced. In framing instruments such as this, neither the principals nor their legal advisers consider merely what it may be strictly necessary to stipulate for. In order to secure beyond a doubt the performance of that which is conceded, they insert clauses to which no objection is made, because the substance having been conceded, if they be unnecessary, they at least do the one party no harm, and if they be necessary, the other party has a clear right to the insertion. To build elaborately ingenious arguments, and still more to draw from their insertion inferences on which important rights are to be decided, seems to me, I own, to be very unsatisfactory and unsafe. For this reason, I am not very careful to explain the insertion of this saving. But supposing that it were necessary to insert it, if the lease might be determined by the notice, some covenants having been broken and the breaches remaining unsatisfied, it seems to me that even then it would have been reasonable to insert it, although the proviso be construed as a condition precedent, equally in the one case as the other; for parties do not always act on their extreme rights, and they do not always know all the facts which affect their relations with each other. The landlord might suffer the lease to be determined by the notice, although he knew of a covenant broken, or he might acquiesce in the notice in ignorance of a breach. In either case it would be important for him to have preserved his remedies on the lease for such breaches. The words of the saving, without any alteration, would be proper to preserve those remedies to him.

My answer, however, to your lordships' question does not rest on this explanation, but upon the broad principle of construing language

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which is unambiguous according to its plain meaning, and ascertaining the intention of parties from the language they use so construed; and I think it of the utmost consequence not to be diverted from that principle in any judicial decision by the apparent inconvenience or hardship which may follow. It is far better that a known and certain and reasonable rule should bear hard on an individual now and then, who may thank his own incaution, or, it may be, his own dishonesty, for what he suffers, than that the whole public should labor under the intolerable grievance of having no certain rule at all by which their contracts are to be construed; and this last, (I say it with great respect for my brethren from whom I differ,) seems to me the natural consequence of straining the language of this proviso so as to make it other than a condition precedent.

PARKE, B. To the question proposed by your lordships, I have to answer that, in my opinion, judgment ought to be given for the defendants below, the plaintiffs in error. The question turns entirely upon the construction of the lease from the defendant in error to the plaintiffs in error, and particularly of the proviso giving the latter the power to determine the lease. [The learned judge read the proviso, and continued:] In construing this clause we must adopt the rules of construction now, I believe, fully established — we must give effect to the words in their ordinary and grammatical sense, and if that leads to any absurdity, or repugnance, or inconsistency with the manifest purpose of the parties to the instrument, to be collected from every part of it, the language must be modified so as to avoid such inconvenience, but no further, and effect must be given to all the words used, if it can be done.

Adopting these rules, I think that the words “all arrears of rent being paid, and all and singular the covenants and agreements on the part of the lessees having been duly observed and performed,” do not constitute a condition precedent. It will at once be seen that the performance of all the covenants could not be a condition, for there are some which do not apply until after the end of the term, which it was, therefore, impossible to perform before; and it is perfectly clear that the language of the proviso must be modified, by confining the condition of performance to such as it was the duty of the lessees before that time to perform. But it is possible that the lessees might observe and perform every covenant to be performed before the expiration of the notice, and therefore there is not the same indisputable reason to alter the language of the proviso as where it is absolutely impossible. The extreme difficulty, however, of performing many of the covenants contained in this lease exactly, coupled with the great importance to the tenants to be able to determine a lease of mines which is of such a speculative character and attended with so much risk, renders it highly improbable that the parties could have intended that the power to determine the lease should depend upon the performance by the lessees of every covenant, especially when some of them are of such a description that no degree of care would certainly secure their performance; such as the covenant to keep the

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grass lands free from trespass, which is a warranty against trespassers, and the covenant to consume on the premises all the hay, straw, and turnips produced thereon, which, if it should be pressed with extreme strictness, would be broken if every cart-load of straw were not so spent, even though it might have been stolen, or destroyed by accident. These are good reasons for supposing that the parties never could have intended to make the exact and due observance of all and every such covenants a condition precedent, either to the right to determine the lease, or to the offgoing crop, which is in the same category. If they did so intend, the defendants would of course be bound, just as a lessee is who agrees that his lease should be forfeited for any breach of covenant, however trifling. But it is to be observed that in such a case the lessee does not merely rely on the forbearance of the lessor in not insisting on each minute breach, but a forfeiture is by law waived by every subsequent act, even of the slightest nature, affirming the lease after knowledge of its being forfeited. In this present case, no waiver by the lessor of the breach of covenants actually broken would put the lessees in the same situation as if they had been performed according to the terms of the lease; for that would be to vary the stipulations of an instrument under seal by parol, which cannot be done. The acceptance of an agreed satisfaction by parol would discharge a covenantor from damages for the breach of covenants, or might be evidence of a new contract, on the terms of the deed, as explained in the case of *Heard v. Wadham*, 1 East, 630, by Lord Kenyon and Lawrence, J., but the stipulation of a deed cannot be varied without a deed.

If, however, there were no expressions in this lease to qualify or explain the meaning of the words "all and singular the covenants and agreements on the part of the lessees having been duly performed," it would be difficult to avoid giving them full effect as a condition precedent, and the authority of the case of *Porter v. Shephard*, 6 T. R. 665, could not be satisfactorily distinguished. The words there were certainly stronger, "from and after payment of rent and performance of covenants," being clearer words of condition; and the covenants, too, in that case, were not so numerous, or so difficult to perform as in this lease; but still, I think that, unless there had been some qualifying words, the case would have called upon us to decide in conformity with it. But there are very important words which follow, and which I think cannot be reasonably explained, and have effect given to them according to their ordinary meaning, without holding that the words "all and singular the covenants and agreements, &c., do not constitute a condition precedent. These words follow: "Nevertheless, without prejudice to any claim, or remedy which any of the parties hereto, or their respective representatives, may then be entitled to for breach of any of the covenants, or agreements hereinbefore contained." These words, according to their ordinary construction, clearly show that, after the end of the lease by the notice, breaches of covenant might still exist, in which the lessees might have to sue, and consequently that the parties never could have intended that the performance of every covenant should be a

condition precedent; for if that had been the meaning, the reservation of the right to sue on the broken covenant would be absurd, as the lease could not have determined at all. A very intelligible and consistent meaning may be given to the whole sentence without doing violence to the words. The effect would be this: If eighteen calendar months' notice in writing should be given, expiring at the end of the eighth year, then if the arrears of rent are paid, and all the covenants have been observed, the lease, and every clause and thing therein contained, shall, at the expiration of the eighth year, cease and determine, and be utterly void, to all intents and purposes; the lease shall become as waste paper and useless; but if covenants are broken on either side, the remedy in the other shall still continue, and the lease not cease and be void in respect of the remedy for those breaches, though it shall for other purposes. It is true that the clause provides that "it shall be void in like manner as if the whole of the years of the term had run out and expired;" and if that only had been the case, the lease would not be altogether void and like waste paper. But these words may be construed, not to limit the preceding declaration that the lease shall be utterly void, but to explain that such termination of the lease shall also be on the same footing as the expiration of the term by efflux of time, as to the many covenants depending upon the end or determination of the term contained in the lease. This construction makes all the provisions consistent; but if this construction is not adopted, the clause must be expunged, or the language of this clause must be materially altered, in order to make it consistent with the supposition, that the words before so often quoted were a condition precedent.

It is said by Patteson, J., in delivering the judgment of the Court of Exchequer Chamber, that the additional clause may be consistently explained in three ways. All of these require the addition or the striking out of words. First, it is said they may have been inserted to enable the lessor to recover for breaches not known at the end of the term. But the clause reserves the right to remedies for any of the covenants without any such limitation. To confine it to "the undiscovered breaches" would be to add words; so would it be to confine it to remedies by reëntry or distress, for the clause is not to prejudice any claim of remedy; nor, if the rent had been all paid, and the covenants all performed, could there be any right to reënter or distrain.

Secondly, it is said the clause would apply if the lessor had waived the condition precedent by accepting notice and taking possession, though he might be aware of some breaches of covenant. But that would require an addition of words to limit the remedy to such previous breaches of covenant; whereas, as the clause stands, it is given as to all. Nor, for the reason before assigned, could the lessor waive, by accepting and taking possession, the performance of the condition precedent; a deed was necessary for that purpose; and after such waiver and taking possession, the lease would still continue if the performance of the covenant was a condition precedent, and the covenant were not performed. To give complete effect to this

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construction, it would be necessary to add, after the words "all the covenants being duly performed," some such additional words as "unless the lessor shall think fit to waive or excuse such performance."

In the third place, it is said the stipulation may have been introduced to preserve the right of the lessees to sue on the lessor's covenants. To that the answer was not satisfactory, that it was confined to the covenants "thereinbefore contained," and that there was none on the part of the lessor, for it appears that there was one covenant in a prior part of the deed by the lessor. But this explanation cannot be adopted without altering the words of the clause, and confining it to the covenants of the lessor; whereas the words are general, reserving the remedies to both parties and their representatives. Therefore, to adopt the construction put by the Court of Exchequer Chamber on the latter part of the clause, and to make sense of it, would require considerable alteration of the language, and that for the purpose of construing this to be a condition precedent, which would render the valuable right of determining a speculative lease practically inoperative, for though the covenants could by possibility be performed, practically speaking, they never could be. It is true that the construction which I think should be put upon the clause, deprives the lessor of the additional security for the performance of the covenants, which he would have in the continuance of a long lease, which the lessees could not get rid of without their performance, but still, he would have his remedy against the lessees for all those breaches, if the lessees were solvent; and if they were insolvent, the continuance of the term would not be of any advantage. Construing this instrument according to the ordinary rules, I confess I think it clear that the meaning of the clause in question was, that the payment of arrears and performance of covenants, should not be a condition precedent, and consequently that judgment should be for the defendant below.

THE LORD CHANCELLOR, after thanking the learned judges for the very lucid manner in which they had stated their opinions, moved to postpone the further consideration of this case.

August 5, 1853. The House now proceeded to deliver judgment in this case.

THE LORD CHANCELLOR, (Lord Cranworth,) after stating the facts of the case, proceeded: The question is, therefore, a purely legal one, and on it the judges, whose assistance your lordships requested, have differed in the proportion of eight to three. Eight of the judges thought that the judgment of the Exchequer Chamber was right; three were of opinion that the original judgment of the Court of Exchequer was right. The question turns upon the single point, whether, there being this particular proviso enabling the tenants to determine the lease, the actual performance of all the covenants is a condition precedent to the right to determine the lease. When this

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The parties contemplating, as regards the lessor, the possibility of his resumption of possession without being aware of a breach of covenant committed during the eight years by the lessees; and as regards the lessees, the possibility of their having at the expiration of the eight years, a right of action against the lessor, may account for its introduction *abundanti cautela*. For these reasons, I think that the words, "all arrears of rent being paid, and all and singular the covenants and agreements on the part of the lessees having been duly observed and performed," as used in the proviso, constituted a condition precedent; and I answer the question, whether, on this record, judgment ought to be given for the plaintiffs in error or the defendant in error, proposed by your lordships, that, in my opinion, the defendant in error is entitled to your lordships' judgment.

WIGHTMAN, J. In answer to the question proposed by your lordships, my opinion is, that, upon this record, the defendant in error is entitled to judgment. The question in the case is, whether the lessees of the colliery were entitled to determine a lease for forty-two years, at the end of the first eight years of the term, by giving eighteen calendar months' previous notice, though they had been guilty of a previous breach of covenant; in other words, whether the performance by the lessees of the covenants in the lease, was a condition precedent to the right to exercise the power to determine it. This depends upon the construction to be given to the proviso which contains the power to determine the lease. The proviso is in these terms: [The learned judge read the proviso and continued:] The question has been considered in the Courts of Exchequer, Queen's Bench, and Exchequer Chamber, and all have agreed in this, that, except for the words at the end of the proviso, "but nevertheless without prejudice to any claim or remedy which any of the parties hereto, or their respective representatives, might then be entitled to for breach of any of the covenants or agreements hereinbefore contained," the performance of the covenants would have been a condition precedent to the exercise of the power to determine the lease. But it was considered by the Court of Exchequer, and has been urged by the counsel for the plaintiffs in error, that the words in the previous part of the proviso, which of themselves were unambiguous, and would clearly make the performance of the covenants a condition precedent, were so controlled or explained by the words of the latter part of the proviso, that they would not amount to a condition precedent, or indeed, to any condition at all, and that the case of *Porter v. Shephard*, 6 T. R. 665, which would otherwise be a direct authority for the defendant in error, was on that account distinguishable. It is said, on the part of the plaintiffs in error, there is an inconsistency in making the exercise of the power to determine the lease, depend upon a performance of the covenants, if such exercise of the power is to be without prejudice to any claim or remedy by either party, for breach of covenant; as it would be idle and useless to except from the operation of an intermediate determination of the lease, any claim or remedy for breach of covenant, if the lease could only be

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of the lease, though there might be breaches of the covenants on which the parties would be entitled to sue. That view the Court of Exchequer Chamber did not adopt, and it is now for your lordships to decide which reasoning you will follow, whether that of the Exchequer or that of the Exchequer Chamber.

My lords, were this point to have been decided by myself, I confess I should have been very much inclined to adhere to the opinion of the Court of Exchequer. I formed that opinion then, and I am strongly inclined to adhere to it. But, my lords, in a question of pure law, though undoubtedly your lordships are not bound by the opinions given by the learned judges, yet when there was so large a majority of them, eight thinking that *Porter v. Shephard* was rightly decided, and that it governs this case, and only three adopting the view of the Court of Exchequer, I should have been extremely loath to let my own judgment unduly influence your lordships; and I am bound further to say, that my noble and learned friend, Lord Brougham, who is now absent from ill health, having heard the whole of this case, has communicated to me his conviction that *Porter v. Shephard* does govern this case, and that the opinion of the majority of the judges is the correct view of this case. The case, therefore, stands thus: There was an unanimous judgment in favor of the original plaintiff in the Exchequer Chamber, and eight judges to three now think that judgment was right; and if my noble and learned friend were here in his place, and I, acting upon my own judgment, were to move your lordships to reverse the judgment of the Exchequer Chamber, that could not be done; because, supposing no other noble lord to take part in the case except those who heard it, there would be one noble lord only for reversing, and the other for affirming. Now, it is well known that a judgment cannot be reversed unless a majority of the noble lords who have heard the case, come to the conclusion that it ought to be reversed. If they are equally divided, the judgment stands. Therefore, although I do not disguise from your lordships that I still entertain a strong conviction that the original judgment was right, and that the judgment of the Exchequer Chamber was not right, I feel it my duty to move your lordships that the judgment of the court below be affirmed.

Judgment of the Court of Exchequer Chamber affirmed, with costs.

covenants on the part of the lessees having been duly observed and performed" to amount to a condition precedent, effect is given to every part of the proviso; whilst by the construction contended for by the plaintiffs in error, those words, apparently so important, are reduced to mere surplusage, and no effect or meaning whatever is attributed to them; and I therefore think that, upon this record, judgment ought to be given for the defendant in error.

COLERIDGE, J. I am of opinion that on this record judgment ought to be given for the defendant in error. It is agreed that the question turns upon the proper construction to be given to the proviso for the determination of the lease, which has been already more than once read to your lordships, and which, therefore, I need not repeat. It cannot, I think, be disputed that if these words are to be understood in their plain and obvious meaning, they express most unambiguously the intention of the parties to be, that the lessees shall not have the benefit of determining a forty-two years' lease at the end of the first eight years, and subsequently at the end of any three years, unless they have first paid all arrears of rent, and duly observed and performed all and singular the covenants and agreements on their part to be observed and performed. The condition, thus expressed, I think it reasonable to understand, as requiring that the account between the parties must, both as to rent and covenants, be clear: the rent need not have been always paid on the day, but all arrears, if any, must have been paid up; the covenants must have been strictly kept, or, if broken, must have been satisfied for. So understood, the words import a condition precedent neither impossible nor unreasonable; and where that is clearly the case, the mere difficulty of performance, from the number or nature of the covenants to be performed — a fact which must have been perfectly within the knowledge of the parties contracting — seems to me a very unsatisfactory reason for holding it to be otherwise. If the number of the covenants or their nature be in this case a sufficient reason, where is the line to be drawn? What number will be sufficient, or what character will be difficult enough, to show that the parties could not have intended a condition precedent? Or if it be said that here, at all events, the number or nature pass the line which it may be difficult to define, why did the parties, not intending a condition precedent, use language to which, without regard to these considerations, no other meaning could possibly be given? The supposition is, that the lessees, looking at the numerous and difficult engagements they had entered into, could not have intended, and did not intend, to make their power of determining the lease dependent on the punctual fulfilment of them. But how is this to be reconciled with the use of language so unambiguously expressing that intention?

But then it is said — and upon this alone reliance was placed in the Court of Exchequer — that a qualification is added at the end of the proviso, which shows that the language preceding must be understood in some modified sense. What that modified sense is has not been very clearly explained. The qualification is this: "Neverthe-

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300 bags of coffee, shipped by the plaintiffs, (now appellants,) to the defendants, on their order and at their risk; and also for the charges on a bill of exchange drawn by plaintiffs on defendants, which had been protested for non-payment.

The declaration stated that the plaintiffs were merchants at Rio de Janeiro, carrying on business under the firm of Maxwell, Wright, and Co.; and the defendants were also merchants at Port Elizabeth, Cape of Good Hope, carrying on business under the firm of Deare and Deitz; that the defendants requested the plaintiffs to ship, per the brig Susan, for the account of defendants, 300 bags of coffee, and instructed them, for payment thereof, to draw on Reid, Irving, and Co., of London; and that, in compliance with said order, the plaintiffs shipped in the brig Susan, the said 300 bags of coffee, in or about July, 1847, which coffee was duly received by defendants; that, for the payment of the said order, the plaintiffs, on 10th July, 1847, drew upon Reid, Irving, and Co. a bill for 588*l.* 1*s.* 3*d.*, at sixty days' sight; that the bill was duly presented to Reid, Irving, and Co., and by them accepted — but, before the bill became due, they became insolvent; that the bill was duly protested for non-payment, and that no payment had been received by the plaintiffs; whereby the plaintiffs were entitled to have and demand from the defendants payment for the coffee, and the expenses, with interest and charges, attending the said bill.

Pleas.—1. *Non-assumpsit.*

2. That, before and at the time of the ordering by the defendants, from the plaintiffs, of the said coffee, Reid, Irving, and Co. were the agents, in London, of the plaintiffs, and also of the defendants; that, at the time of the ordering by the defendants, from the plaintiffs, of the said coffee, it was stipulated by the defendants, and agreed to by the plaintiffs, that the defendants should pay or satisfy to the plaintiffs the costs or price of the said coffee, by causing or procuring the said agents of the plaintiffs — Reid, Irving, and Co. — to give credit to the plaintiffs in account, and agree to hold for plaintiffs, and at their order and disposition, the amount of the cost or price of the said coffee, with all charges; that it was further agreed between the plaintiffs and the defendants, that the credit should, for convenience, be given by Reid, Irving, and Co. to the plaintiffs, by means, in the form, or through the medium, of a set of bills of exchange, to be drawn by the plaintiffs, upon the said Reid, Irving, and Co., as was customary in such cases; that the defendants did accordingly cause and procure Reid, Irving, and Co. to consent to give to the plaintiffs such credit, by authorizing and directing Reid, Irving, and Co. to charge against the defendants in account the amount of whatever sum they should, through the medium of the said *pro forma* bills of exchange, place or carry to the credit of the plaintiffs, and hold at their disposal; that the plaintiffs, in pursuance of the said agreement, on 10th July, 1847, at Rio de Janeiro, drew a set of bills of exchange in three parts upon the said Reid, Irving, and Co., whereby they requested Reid, Irving, and Co. to pay to the order of themselves, Reid, Irving, and Co., at sixty days after sight, of that one of the

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said three parts which should be first seen by Reid, Irving, and Co., 588*l.* 1*s.* 3*d.*, to be charged by Reid, Irving, and Co. to the account of the defendants; that afterwards, to wit, on the 28th August, 1847, at London, the said three parts, or some of them, were received by Reid, Irving, and Co. from the plaintiffs, who thereupon, by the authority or with the consent of the plaintiffs, and according to the true intent of the said agreement between the plaintiffs, and the defendants, gave the plaintiffs credit in account for the amount of the said bills, and charged the same amount to the account of the defendants, who then had moneys and goods in the hands of Reid, Irving, and Co. to an amount more than sufficient to cover and satisfy the said sum; and so the defendants say that the bills and the said 588*l.* 1*s.* 3*d.* were, on the said 28th August, 1847, at London, between the plaintiffs and the defendants finally settled and satisfied by the transfer of the said amount of 588*l.* 1*s.* 3*d.* by Reid, Irving, and Co., from the credit of the defendants on account, in such a manner that the defendants wholly and forever ceased to be entitled to the sum so transferred, and that the plaintiffs became entitled thereto, as held for them and at their disposal by their said agents, of all which the plaintiffs had notice.

Replication. *Similiter* to the first plea, and joinder of issue on the second plea.

At the trial, the following facts appeared: The letter of defendants to the plaintiffs, ordering the coffee, was dated 25th May, 1847, the only material part of which was as follows: "For the costs of said order, we have opened a credit in your favor, with our mutual friends, Messrs. Reid, Irving, and Co., London. In drawing upon them for your invoice amount, as customary, you will please to hand them duplicate invoice and B. lading, with order to insure our interests, forwarding also the inclosed letter to said friends. We trust that this mode of reimbursement will meet your approval, as it is the only one with the exception of sending specie (and which, as the vessel is first touching at Table Bay, from this, would not offer any advantage) we could have adopted." The inclosed letter referred to, from defendants, to Reid, Irving, and Co., was of the same date, and as follows: "Having transmitted to Messrs. Maxwell, Wright, and Co., Rio de Janeiro, an order to ship for our account, on board the brig Susan, Captain Pryce, about 300 bags of coffee, we hereby make free to open a credit, in their favor, for the costs of said coffee, to the extent of 650*l.*; and in drawing upon you for our account, at usual sight, Messrs. Maxwell, Wright, and Co. will hand you duplicate B. lading and invoice of our parcel of coffee, and also order to cover the same by insurance as customary." The brig Susan soon after sailed from Rio to Port Elizabeth; and on return, plaintiffs shipped on board the 300 bags of coffee, and sent this letter of 12th July, 1847, to defendants: "We have to acknowledge the receipt of your esteemed favor of 25th May, handing us memorandum of brig Susan's charter-party, and directing us to ship on board of said vessel 300 bags of coffee for your account, which we have done, and inclosed beg to hand you invoice and B. lading of same. Inclosed

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also, please find account current balancing this transaction to a point by our draft on Messrs. Reid, Irving, and Co., London, for 588*l.* 1*s.* 3*d.* We have written said friends, requesting them to provide the necessary insurance on this shipment, and have already forwarded them the shipping documents, and your letter, &c. Maxwell, Wright, and Co."

The plaintiffs on 10th July, 1847, drew a bill of exchange for 588*l.* 1*s.* 3*d.* on Reid, Irving, and Co., as follows:—

"At sixty days' sight, pay to second of exchange, (first and third not paid,) to the order of yourselves, the sum of five hundred and eighty-eight pounds, one shilling, and three pence sterling, for value in account, which place to the account of Messrs. Deare and Deitz, of Port Elizabeth, Algoa Bay, as per advice.

"MAXWELL, WRIGHT, AND CO.

"Reid, Irving, and Co., London."

The defendants, on receipt of the coffee, wrote to the plaintiffs on the 21st August, 1847, acknowledging the same, and alluding to the plaintiffs' drawing on Reid, Irving, and Co., "all of which goes in order."

On 28th August, Reid, Irving, and Co., who had for some years been agents, both of plaintiffs and defendants, received the bill. They marked it as accepted; but, as the bill was in their own possession, they at first did not sign it, as it was made payable to them; though afterwards, on its becoming due, they formally accepted, by signing the name of the firm across it. On 30th October, 1847, it was indorsed by them to Baring Brothers, and Co., when the latter, on the part of the plaintiffs, demanded the bills and securities in the possession of Reid, Irving, and Co., belonging to plaintiffs. Reid, Irving, and Co. stopped payment on 17th September, 1847. In their books, the defendants were debited as on 28th August, 1847, for the bill due on 30th October, 1847. At no time had Reid, Irving, and Co. assets sufficient to cover their liabilities for defendants on said bill. In a book of Reid, Irving, and Co., containing their account current with plaintiffs, the latter were credited as on 28th August, with bill on Reid, Irving, and Co. for 588*l.* 1*s.* 3*d.*

The plaintiffs were creditors of Reid, Irving, and Co. at the time of the latter firm stopping payment.

The bill was duly presented for payment, and protested for non-payment on 30th October, 1847.

At the trial, plaintiffs (appellants) tendered evidence to show that the entry made by Reid, Irving, and Co., to plaintiff's credit, was, in mercantile usage, conditional on the payment of the bill. This evidence was rejected, and the ruling of the judge was ultimately confirmed by the court, and judgment given for the defendants on the following grounds, as drawn up in conformity with the practice of the Privy Council by Wylde, C. J. "The unanimous judgment of the court was for the defendants, with costs, upon the following grounds: First, That this case bore no analogy to that in which a

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bill is given by the purchaser of goods, which is accepted on presentment, and subsequently dishonored in consequence of the failure of the acceptor. Secondly, That the plaintiffs in this case appeared to have agreed to execute the order in question upon the terms proposed by the defendants in their letter of 25th May, 1847, and to accept, in satisfaction of their demand, the credit which was opened in their favor for the amount of it by the defendants with Reid, Irving, and Co., of London, who were the agents of both parties in the transaction. Thirdly, That such credit when so opened, was to be regarded as so much money set apart by the defendants from their other funds, and placed at the immediate disposal of the plaintiffs, of which the defendants could no longer avail themselves for the purposes of trade, and which was, therefore, as entirely at the risk of the plaintiffs as any other money which they had in the hands of the agents at the time of the bankruptcy. Fourthly, That the plaintiffs, having executed the order upon the faith of such credit, were at liberty to appropriate the amount of the cost of such order immediately after such credit was opened; and, as they drew for such amount upon and in favor of Messrs. Reid, Irving, and Co., who were their own agents as well as their paymasters under the contract, and their bill was duly honored and passed to their credit and to the debit of the defendants in the books and accounts of the house on the day on which it was received in London, the credit in favor of the plaintiffs was thus effectually opened in fulfilment of the engagement of the defendants, and the amount of the costs of such order thus virtually appropriated by the plaintiffs under such credit. Fifthly, That Reid, Irving, and Co. being the agents of both parties, and at once the drawers and payees of the bill, having thus treated it as payable on presentment according to the view which they would seem to have taken of the real nature of the transaction, would, if they had not become insolvent, have doubtless afterwards arranged the matter by discount in the settlement of their accounts with their respective principals. Sixthly, That, as the plaintiffs were not restrained by the terms of the contract from drawing for the costs of the shipment by a bill payable on presentment, and would, if they had so drawn, have doubtless realized the demand, they had, as against the defendants, whose liability on the contract they had no right to protract, incautiously incurred an unnecessary hazard by drawing as they did at sixty days after sight, and ought, therefore, in point of equity, to bear the loss which had arisen from the intermediate failure of the house. *Bolton v. Richard*, 6 T. R. 139; 1 Esp. 106; *Eyles v. Ellis*, 4 Bing. 112; *Bodenham v. Purchase*, 2 B. & Ald. 39; *Wade v. Wilson*, per Holroyd, J., 1 East, 195; 3 Burge, Col. Law, 795. The plaintiffs tendered evidence for the purpose of showing that the entry of the 28th August to the credit of the plaintiffs and to the debit of defendants, was conditional on the payment of the bill when due in October; and that, in fact, it was the practice of some houses to make such entries on the days of acceptance, for the sake of convenience; whereas others did not credit or debit bills until after payment. They also tendered mercantile evidence in explanation of the intentions of the parties. But the

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court, having taken a distinct view of the nature and legal construction of the special contract in question, upon the face of a particular correspondence, in which the intention of the parties was unambiguously expressed, and looking at the ostensible acts of the agents on whom the bill was drawn, in so far as they stood connected with that special contract, without deciding 'as to the effect which ought in ordinary transactions between principal and agent to be given to the mere debiting and crediting of bills in account before they are actually due,' considered that the evidence which the plaintiffs proposed to adduce as to the usage and opinion of the merchants of this colony was, under the circumstances of this case, irrelevant and inadmissible in point of law, and rejected it accordingly. *Edie v. East India Company*, Burr. 1216; *Gabay v. Lloyd*, 3 B. & C. 793; *Palmer v. Blackburn*, 1 Bing. 63; *Seyers v. Bridge*, Doug. 509; *Yates v. Pym*, 6 Taunt. 446; *Cross v. Eglin*, 2 B. & Ad. 106; *Anderson v. Pitcher*, 2 B. & P. 168; *Hodgson v. Davies*, 2 Camp. 531."

Against this judgment the plaintiffs now appealed.

Thesiger, Q. C., and *Cowling*, for appellants, contended that no payment or satisfaction had taken place in the circumstances; but that the liability was merely suspended until the maturity of the bill, and on non-payment revived, as if no bill had ever been given. *Ex parte Blackburn*, 10 Ves. 206; *Taylor v. Briggs*, M. & M. 28; and cases cited in the judgment of the court below.

Bramwell, Q. C., and *Phipson*, for respondents, relied on the forms of the entries in Reid, Irving, and Co.'s books, as importing immediate satisfaction. *Harmer v. Steel*, 4 Exch. 1, and cases cited above.

Thesiger, replied.

JERVIS, C. J. The judgment of the court below ought to be reversed. The case is narrowed to the construction to be put upon the letter of the 25th May, 1847. If the appellants had agreed to have accepted the credit of Reid, Irving, and Co., they would have had no case; but they never did accept it. The judges of the court below seem to have considered that, the credit being entered in the books of the mutual agents, therefore the vendors had a right to draw as against that credit; and that, by reason of the laches of the vendors for sixty days, the time of running of the bill of exchange, the plaintiffs had lost their remedy. [His lordship then read the reasons of the court below as given above.] The court must be considered to have been mistaken in that view of the case, in treating the credit as an immediate payment, and therefore that the vendors were bound to take upon themselves the risk of their agent's insolvency. We cannot agree with the court below, that by means of the entry of this credit the acceptance of the drawees of the bill was to be taken as a payment. We consider it quite plain, looking at the correspondence, that the object was to substitute a bill of exchange for a cash pay-

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ment as a mode of payment; but only to be considered so, if the bill was duly honored at maturity, whereby the agents would have realized funds in their hands belonging to their employers, the vendors. Although Reid and Co. had entered the amount of the bill of exchange in their books, they had no right to do so as a present payment, without the concurrence of the parties to whom it belonged. They should only have done so, if honored at maturity. The result, therefore, was to reverse the judgment of the court below, and declare that the judgment ought to have been entered for the plaintiffs, the present appellants, for the sum of 588*l.* 1*s.* 3*d.*, and charges and interest from the 30th October, 1847, according to the Dutch law, with all costs of suit in the court below. No costs of the appeal.

Reversed.

MACKELLAR v. WALLACE and another.¹

June 17, 1853.

Accounts — Debtor and Creditor — Adjustment of Accounts — Practice — Reference to the Master.

Where parties agree to settle accounts, by ascertaining the exact balance, and for that purpose produce vouchers and give information, if it should afterwards turn out that there were errors in that account, a court of equity will open it up and set it right; but otherwise, if the parties met, not to ascertain the exact balance, but to agree to take a gross sum as such balance. In both cases, however, fraud will vitiate the settlement or compromise.

Circumstances where the court held (reversing the decision of the Supreme Court at Calcutta,) that, from the dealings between the parties, the nature of the accounts, and mode of settlement, such settlement must be taken to have amounted to a compromise, and was, therefore, conclusive against all parties it concerned.

Where the plaintiff, instead of appealing against the decree directing an account, went in before the Master, and proceeded a certain length in verifying the accounts, but, on the Master making a separate report, stopped short and took exceptions, which being overruled, he appealed against both the original decree and the order overruling the exception, and succeeded in reversing the decree : —

Held, he must, nevertheless, pay the costs of the proceedings in the Master's office, with respect to that portion of the bill ordered to be dismissed.

THIS was an appeal from a decree and order made in two suits on the equity side of the Supreme Court at Calcutta.

The material facts beyond those stated in the judgment, were these: In 1831, the appellant, Henry Mackellar, then sole partner of the firm of Gibson and Co., of Calcutta, entered into partnership with the respondents, J. Wallace and W. Leslie, under the style of Gib-

¹ Before the Right Hon. T. B. LEIGH, Dr. LUSHINGTON, Sir E. RYAN, and Sir J. PATTESON.

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son, Mackellar, and Co. The deed of copartnership, dated 20th May, 1832, provided power to the appellant, at any time, to assign his share to his brother, Thomas Mackellar, which he did a few months thereafter; but Thomas Mackellar died soon afterwards. It also provided that the new firm should recover the debts due to appellant by customers of the old firm, and account to him for the same; and that, if appellant should at any time leave Calcutta for England, the firm should appoint him their agent for Europe, through whom they should remit all sums of money. The appellant left India in the beginning of the year 1833, for England, and the firm appointed him and his brother, A. D. Mackellar, of the firm of D. Mackellar and Son, clothiers and tailors, Old Burlington-street, London, their joint attorneys, to recover all debts in Great Britain due to the Calcutta firm. From 1833 to 1838, however, appellant acted merely as agent to A. D. Mackellar in recovering such debts; and he was directed, soon after his arrival in England, to hand over all the goods purchased for the Calcutta firm, to D. Mackellar and Son, London; but appellant advanced large sums from time to time in such purchases, for which he charged a commission.

Up to 1837, various bills of exchange and accounts had passed between appellant and the Calcutta firm; but, at length, some dissatisfaction arose. In 1837, appellant sent a power of attorney to Mr. Greenaway, of Calcutta, empowering him to recover the sums due to him from the firm, and to adjust and settle the account. Accordingly, Greenaway presented an account current between appellant and the firm, of all their dealings and transactions in business (other than the debts collected by the firm for appellant) from June, 1832, to 31st January, 1838. This account was objected to, whereupon Greenaway requested the firm to make out the account as they admitted it. This they did, and by such account, they admitted a balance of 491,695 rupees, 14 annas, and 3 pice, to be due to appellant on 31st January, 1838. The difference in amount between this account and that of appellant, was 3,757*l.* 15*s.* 1*d.*; but the difference arose entirely out of certain discounts which the firm claimed to have allowed to them. In consequence of this discrepancy, various negotiations took place, and at length the firm paid a sum in cash, and agreed to pay instalments of 25,000 rupees quarterly; and that the disputed item of 3,757*l.* 15*s.* 1*d.* should stand over for future investigation. The bond, given by W. Leslie and J. Wallace, conditioned to pay these instalments of 25,000 rupees quarterly, recited that Leslie and Wallace had examined and investigated the accounts rendered by appellant, up to 31st January, 1838, and that, appellant having agreed to give time for payment, they had admitted the sum of 491,695 rupees, 14 annas, and 3 pice, to be due to him at that date, "but had refused to admit the further sum of 3,757*l.* 15*s.* 1*d.*, claimed as due to the appellant, until satisfied on further investigation and examination."

In May, 1839, Leslie came to England, having a power of attorney to settle the differences as to this item between the firm and appellant, and such differences were finally settled by Leslie's accepting a bill, dated 31st August, 1839, drawn by appellant, payable at

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eighteen months, for 30,744 rupees and 4 annas. This bill being afterwards dishonored, appellant sued Leslie and Wallace in Calcutta, and obtained judgment. Leslie died on 11th June, 1841. On 30th September, 1841, appellant filed a bill in Calcutta for an account against Wallace and the executors of Leslie, (respondents here.) The defendants put in their answers, admitting the receipt of sums to account, but denying negligence. On 1st March, 1843, the defendants filed a bill in the nature of a cross-bill, praying that the whole accounts might be opened up; that appellant might be restrained from receiving any more debts due to him; and that the bill of exchange for 30,744 rupees, on which judgment had been obtained, should be delivered up to be cancelled. The appellant, in his answer, relied on the fact, that, by the giving of the bond and bill of exchange, the accounts had been finally settled and adjusted.

The two causes were heard together; and the Master, on 22d February, 1848, was directed to take an account. He found, by a separate report that the accounts had not been settled, whereupon appellant took exceptions to the report. The court, on the 16th July, 1848, overruled the exceptions, and confirmed the Master's report. The appellant, instead of appealing against the decree directing the reference, had gone in before the Master, and proceeded to verify his account, but had not completed it when the separate report was made.

The appellant now appealed against the original decree of 22d February, 1848, directing the reference, as well as against the order overruling the exceptions.

Wigram, Q. C., and Collins, for the appellant.

Rolt, Q. C., and Leith, for respondents.

Cases referred to: *Allfrey v. Allfrey*, 1 Mac. & Gor. 87; *Wood v. Downes*, 18 Ves. 120; *Montesquieu v. Sandys*, Ib. 302; *Anderson v. Maltby*, 2 Ves. 244; *Walmisley v. Booth*, 3 Atk. 19; *Gibson v. Jeyes*, 6 Ves. 266.

The judgment of the court was delivered by the Right Hon. T. P. Leigh. In the progress of this appeal, we had an opportunity of looking very carefully through the whole of the papers; and, after the extremely clear and able manner in which the case has been argued at the bar, we feel ourselves in a situation to dispose of it at once, without putting the parties to further delay. The law in cases of this sort is perfectly clear. Parties having accounts between them may meet and agree to settle those accounts by the ascertainment of the exact balance; it may be necessary for that purpose, and probably it is necessary in most cases, that vouchers should be produced, and that all the information possessed on one side and the other, should be furnished in the settlement of that account; and if it afterwards turn out that there were errors in that account, it is a sufficient ground for opening such account, and setting it right in a Court of Equity. If, on the other hand, persons meet and agree, not to ascertain the exact balance, but a sum which one is willing to pay and the other is

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content to receive as the result of those accounts—in a case of that sort it is obvious that the production of vouchers is entirely unnecessary, and errors in the account are entirely out of the question; for the very object of the parties is to avoid the necessity for producing those vouchers, upon the assumption that there are or may be errors in the account so settled. Therefore, it is either an account stated and settled, in the formal sense of the expression; or it is the case of a settlement by compromise. In either case, it might be vitiated by fraud; in either case it is good for nothing if, either from the collusion of the parties or from the circumstances under which the settlement takes place, it is proved in a court of equity, that the transaction was not so fairly and so fully understood between the parties, either from the confusion in which it was involved, or from misrepresentation made on the one side or the other, as it ought to have been, and that injustice has been done on either side.

In the present case, it appears to us very clearly, that the settlement which took place was in the nature of a compromise—an acceptance by one party, and a consent to pay by the other, of a gross sum in satisfaction of a disputed account. Whether the circumstances under which that settlement took place, were such as to induce a court of equity to set aside the transaction, and direct a general or specific account, depends on the particular facts of the case; and this renders it necessary for me to go more into those details than I should otherwise have done. (The details were then stated up to the time of appellant coming to England.) On coming to England, the appellant acted as he agreed to do, as the agent for the new firm, at Calcutta. Having come over to England, the appellant not only selected the goods that were to be sent to the Calcutta firm, but he himself paid for those goods; and it appears from the accounts which are not the subject of dispute, that the advances he made in that respect, were so large, that at the end of 1833, they amounted to 11,676*l.*; at the end of 1834, they amounted to 20,685*l.*; and at the end of 1835, to about 29,000*l.* During the whole of that time, invoices were sent of the goods that were thus furnished to the respondents. Invoices, of course, would be sent by the parties who supplied the goods; and, with a single exception, all those goods were supplied by the firm of D. Mackellar and Son, of London. These invoices would, of course, show to the respondents the amount of the goods which they were alleged to have received, and the amount of the invoice prices which were represented to have been paid for those goods. On the other hand, they would not show what charges the appellant was disposed to make for the agency he performed on their behalf in England, or the allowance which he might make, or might refuse to make, in respect of the sums that were charged in the invoice account. But, in the autumn of 1836, an account current was sent of all the dealings and transactions which had taken place in respect of that agency from the beginning; to what date does not distinctly appear, but, at all events, it must have been up to the end of 1835. That account would show every thing. It would show what charges he made; it would show at what rate the interest was charged, and at what rate

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commission was charged; and in the course of all these proceedings, no observation was made on the account so rendered, either in the shape of approbation or disapprobation, until a period which I will afterwards mention. They proceeded in that way; Henry Mackellar continued to purchase goods, and to send them out, paying for those goods, until the month of January, 1838, and probably until a subsequent period; but it is only to the period of January, 1838, that it is necessary for us to apply our attention. In 1838, according to the account as made out by the appellant, there was due to him on the old account 228,491 rupees; and on the new account, or the purchase account, the sum of 36.169/. These accounts were sent out to Mr. Greenaway, his agent at Calcutta, with directions to him to obtain a settlement of those accounts, and with power to Greenaway to give a discharge for any thing which might be paid in respect of them.

With those accounts thus sent out to Greenaway, the appellant sent a letter, on which much reliance was placed by the respondents. It was to be observed, that, in this account current, there was this distinction: up to the month of June, 1836, and during part of the month of June, 1836, there was an allowance for discount made by the appellant in all these accounts. What the distinct rate was, is not, perhaps, in all cases, very clear; but we will take it at 2½ per cent., as the respondents allege that it was. But, from the end of June, 1836, there was no allowance for discount at all; therefore, there was a difference in the discount allowed. Up to June, 1836, a discount was allowed, and after 1836, no discount allowed; and in 1838, Greenaway, the agent, received the accounts, accompanied by this letter to the respondents: "I have now the pleasure to forward a copy of your account current, to which I do not anticipate any objection." It is clear, therefore, that there had been some previous correspondence and discussion between these parties with respect to the result of these accounts. With respect to the dealing, he says: "The discounts have been shown where allowed on the account rendered. You will observe from the last shipment in June, 1836, no discount has been allowed, the whole of the goods having been purchased for cash, and consequently none allowed; as, also, in the account of Bicknell and Moore, inclosed in mine to you of last month." Now, it is said, that this is a misrepresentation by this gentleman; namely: "You will find in this account the whole amount which I have received for discounts allowed." Why, it is quite obvious that it was no such thing. The character of that statement was this: "In part of the account there is discount allowed; in part of the account there is not discount allowed; where discount is allowed, you will see it in the account; and where none is allowed," it is stated, "I have received none." These accounts, together with a letter of 26th March, 1838, were sent by Greenaway to the respondents—a letter proposing and urging a settlement of those accounts, and offering to correct any errors or omissions that might be found in them. What took place upon this? The respondents had known in 1836, or in the beginning of 1837, when they received this account current, the principle upon which this gentleman was making out his account—the amount on

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which he charged interest, the rate at which he charged interest and commission, and at which he allowed discount. It is very true they did not know by that account, either in 1836 or 1838, what the amount of discount was which the appellant himself had received; but, having these accounts rendered to them, they object. And what is their objection? Why, at first, it did not very distinctly appear what the particular grounds of their objection were; but Mr. Greenaway says: "Well, if you are dissatisfied with this account, render me an account as you say it should be made out—an account with the items which you say it ought to contain." They do make out what they say the discount ought to be; and in making out that account charge the appellant, and debit the account, with discount $7\frac{1}{2}$ per cent. upon every purchase, introducing into the account the corrections that would result from that deduction. It was perfectly true that the effect of that would be to alter every single item in that account; and that seems to have been the difficulty which was pressed upon the court below, namely, that they could not consider it in any sense a settlement, when not only the balance might have been altered, but when there was not one single item in the account which would not be altered if the defence of the respondents prevailed. Then what is the result of that as made out by themselves? The result of the account as made out by themselves, is this: that there is due on that account, instead of 36,000*l.*, a sum of 32,000*l.* or 33,000*l.*, making, therefore, a difference of 3,000*l.* And, then, how is that matter treated by these parties? Why, they say this: "Here is a balance which we must admit to be due from us at all events, to the amount of 491,695 rupees; and if you will give us time for the payment, we will consent not only to admit that balance, but we will pay down 29,000 rupees at once, and we will give security by our bond for the payment of 400,000 rupees by instalments in four years by a lac of rupees in each year."

Now, it is said this is not a compromise, but a settlement. It is not very material; the language, however, of this bond would rather seem as if it were in some sort a compromise even there; for it states that, in consideration that time shall be allowed them for the payment of that balance, it was agreed to admit that 461,695 rupees were due by them; but at the same time they say, that "whereas they have examined and investigated the several accounts of the said Henry Mackellar with the said firm of Gibson, Mackellar, and Co., rendered by or on behalf of the said Henry Mackellar up to the 31st January last, and the said Henry Mackellar having agreed to grant such time for payment as in the condition hereunder written mentioned, the said William Leslie and John Wallace have admitted the sum of Company's rupees 491,695, 14 annas, and 3 pice," (showing the extreme minuteness with which they had made the examination,) "to have been due and owing by the said firm of Gibson, Mackellar, and Co. to the said Henry Mackellar on the said 31st January last; but have refused to admit the further sum of 3,757*l.* 15*s.* 1*d.* claimed as due to the said H. M., until satisfied on further investigation and examination." Now is it possible that there could be a more solemn

adjustment of an account, as far as that adjustment went? The account originally is begun with an account in 1836, a subsequent account in March, 1838, a discussion for nearly six months on those accounts, a final admission of 491,695 rupees being due, and an express reservation of that item of 3,757*l.*, not as a disallowed item, but as an item which at that moment had not been ascertained, but which might be ascertained, and would be ascertained by further investigation and examination. This bond was given, and this bond, as it appears, was paid. Now, not very long after — namely, in the year 1839 — Mr. Leslie, one of those partners, comes over to England. It appears, by subsequent evidence, that he brought with him a power of attorney for the settlement of accounts; it was a partnership matter that he had authority to deal with when he came to England, and which accordingly he did deal with.

Observe, when he came to England, in what position these parties stood towards each other. Here had been the fullest investigation and examination of these accounts, and the fullest time in respect of considering them on every point except one; and that point is one which cannot be cleared up at Calcutta, where Mr. Greenaway is the agent — it must be cleared up in England, unless the vouchers relating to those payments are sent over to India. Mr. Leslie came over; he saw the appellant; and no doubt he had the right then to say: "Before I pay you a shilling of this 3,757*l.*, or give you security for it, you, who are my agent, are bound to give me the whole of the information you possess; you are bound to produce the vouchers which show what discount you have received. I shall then claim, what I am entitled to be allowed upon the Indian account, all the discounts which you have received which are larger than are credited, and therefore to have the account corrected by reducing each and every item of the account according to that reduction." That was his right, no doubt; but, on the other hand, if he thought fit, instead of insisting upon that right, to say: "Instead of going through these accounts — instead of comparing them, instead of ascertaining the balance which may increase or diminish that 3,757*l.* — if you are willing to strike off 1,200*l.* and to accept the balance in full of all demands, I, on behalf of myself and partner, am content to pay that sum; and I will give you my acceptance for the amount so reduced, and there will be an end of the transaction between us" — is it possible to conceive a more fair settlement of an account than this, as far as it has gone? A bill of exchange at eighteen months is accepted, allowing abundant time for the parties in Calcutta, if they objected to the settlement, to object to it, and if they could set it aside, to set it aside. Mr. Leslie goes out to India again in the beginning of 1840; and what is his evidence? When he is communicating with his partner, Mr. Wallace, does Mr. Wallace say he had no authority to make that settlement? Does Mr. Leslie say: "I was coerced — I was under apprehension — I was misled by the representations of this gentleman, and therefore the settlement is not to stand?" Mr. Wallace is proved distinctly to have said, on more than one occasion: "This is a settlement which has been made; a bill of exchange has been given in respect of that

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settlement. If I had been dealing with you, who have not the vouchers, I would have made a better settlement than with the appellant, who has the vouchers; but a settlement has been made, and I suppose the bill must be paid." But it does not rest here. The bill, being given on 31st August, 1839, does not become due until 3d March, 1841. In the interval these parties, who had previously been on the best of terms, appear to have quarrelled. Of course, we know nothing of this case, except from what appears upon the facts and correspondence. They appear to have been under great obligations to Mr. Mackellar. However, whatever their feelings previously had been, it is plain that a rupture had taken place, and feelings of the greatest hostility, to judge by the language of the letters, were entertained by the respondents, or by Wallace the surviving partner, towards the appellant.

Independent of the account to which I have referred, the Calcutta firm had acted as the agents of the appellant in collecting and getting in the debts due to him, as representing the preceding partnership; and he applied to them, made repeated applications, for the account of their receipts in respect of that collection. In October, 1840, more than twelve months after that bill had been given, they write a letter in which they say: "We will not render you any account at all — we will not give you one shilling we have received from you — until you settle our outstanding claim against you." Greenaway writes: "What have you as agents collected? do give me a notion." That is what is due to the appellant. They send him a letter inclosing a rough note of these claims; and neither in the letter nor in the rough note, from beginning to end, was there the slightest allusion to the settlement which had taken place in England. The bill becomes due in March, 1841; it is dishonoured; and an action is brought on 14th March, 1841. Now, what is the course these gentlemen take? They defend the action at law; they obtain a commission for the examination of witnesses in England; and by that means they suspend that action from the month of March, 1841, to February, 1842. That commission was never returned. An application was made with success to set down the cause for trial, and a verdict was then obtained in 1843, which the plaintiff was manifestly entitled to in 1841. Well, this defence was set up — a defence one can hardly call it; and then a few days afterwards they resort to what used to be, and I presume still is, the resource of desperate debtors, namely, they file a bill in equity. Having failed at law, they filed a bill in equity, imputing all manner of fraud in the accounts themselves, and in the settlement of the accounts, and in drawing the bill of exchange by the appellant; and they pray for a general account, for an injunction, and for the delivery up of the bill to be cancelled. To that bill the appellant put in his answer; and what was the result of that answer? It had been read very fairly on both sides. There was no question upon the facts; but there was no evidence in favour of the respondents, except upon that answer; and the result of this is: "The mode in which I have stated this account is, that from 1833 to 1834 I received no discount; from 1834 to 1836 I received discount at rates

ranging from five to two and a half per cent.; from 1836 I received no discount at all in the name of discount, but I received a *del credere* commission at the rate of two and a half per cent. Now," he says, "I insist upon this—that not only according to mercantile usage these were fair and reasonable charges, such as I was entitled to make, but if the accounts had been made out according to ordinary mercantile usage in such cases,—if I had drawn on you for the purchases, instead of supplying you for four years at least with the whole amount of capital by which your business was carried on, instead of being in your favour, I believe the amount would have been 8,000*l*. or 10,000*l*. more against you than it is."

Then it had been said that this was a case in which the transaction whereby the account was settled, by the delivery of the bill of exchange for 30,744 rupees, is to be set aside. On what possible ground is it that this transaction is to be impeached? As we understand the judgment of the court below, the chief justice at the original hearing, or rather on the rehearing, seems to have entertained this opinion. He says: "This cannot be a settled account, because one item was reserved for subsequent verification;" and if he took it on the bond, so it was; but if he took it on the bond and bill of exchange together, then is it a settlement? "I ascertain the amount to the extent of 491,695 rupees. There is another item which I cannot ascertain. I am content—both parties are content, not to have that ascertained, but that one party shall make an allowance; and accordingly it is settled on that footing." We, therefore, did not understand exactly upon what ground it was that the court held that these accounts between the parties were not closed. The chief justice, in the note which he had been good enough to send over of the grounds of his judgment on the rehearing, states only the nature of the objections which arise from the nature of the bond, as well as from the nature of the settlement which is succeeded by the bond; but he does not advert to the bill of exchange at all. When Mr. Justice Colvill gave, what we quite agreed with Mr. Rolt in saying was such a judgment, as far as clearness in expressing the grounds upon which it rests was concerned, as one would expect from him, he overruled the exceptions; but when he had to deal with it, he seems to have felt a little embarrassed by the form of the decree. It is not necessary for us to consider that further, because we are clearly of opinion that the transactions here were closed, the settlement being such as in our opinion was conclusive against all parties concerned; and, the result being such, this bill could not stand, and the court, instead of making either of the decrees it did make, ought to have regarded those accounts as settled, and ought to have dismissed the bill with costs, so far as it sought any account of the transactions included in those accounts, and so far as it sought to have the bill of exchange delivered up to be cancelled.

The only point on which we have entertained some doubt, if at all, was this: It is quite clear that the appellant was right at the rehearing; the second decree could not have been justified, in our view of the case, any more than the decree made at the original hearing; and,

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therefore, up to that time the appellant must have the costs, so far as they relate to that proceeding. But then comes the question as to the costs of the proceeding in the Master's office. We are by no means bound to hold, that, in all cases where the defendant succeeds, he has the costs of the hearing, provided it only is to dismiss the bill. The court directs an inquiry, by means of which inquiry, the plaintiff thinks by further evidence he can succeed in substantiating the case, and, accordingly, he goes into the Master's office and produces that further evidence. Of course, a vast deal of expense will necessarily attend the operation; and the consequence is that usually we are by no means disposed to hold that the defendant is to be compelled to pay the costs, because he should in a doubtful case have appealed to this court, and have succeeded in an appeal against the original decree. But this case was peculiar in its circumstances. The objection which the court seems to have taken, was not upon the nature of the evidence, but it was an objection which, if it prevailed at all, could not be renewed in the Master's office. If it be decided that there was not a settlement of the account after the bond, I am of opinion the Chief Justice was right in thinking that the accounts could only be settled by the verification and ascertainment of each particular item. Therefore, nothing that was done in the Master's office could ever remove that objection; and, consequently, it was not a case in which the appellant could say: "I have, I think, a very good case, but I make it better by going into the Master's office." If he had a case that was good at all, it was as good at the hearing as it ever could be made.

But then there is this: we very much agree with Colvill, J., in his luminous judgment on that point, that, even if we had gone through the accounts in the Master's office, the accounts would probably have been the same, (if we could form a conjecture upon that,) more in favor of the appellant than at present; because, it is clear those accounts must be taken as proof of the goods which were delivered, and the invoices he had for them, and as proof of every thing except the item which he says remained outstanding, and the amount of which would possibly increase the claim on the other side beyond the 491,695 rupees. Now, it appeared to the appellant to be more to his advantage to adopt that course, namely, to get the account settled under the decree, be it right or be it wrong; and he does go in before the Master. He first gets a separate report, which probably it would have been difficult for the Master to have made in favor of the appellant, having regard to what had been done by the decree; but the court having overruled those exceptions, and told him that probably the result in the Master's office would be the same, he proceeds again under that decree; but, instead of working it out to the end, and trying what the result would be in that view of the case, in the middle of these proceedings he turns round and says: "No, I do not think this is taking a favorable course; at all events, there will be great delay and great expense, and now I will appeal against the order on the exceptions, and against the order upon the original decree;" and he makes a substantive application to the court for that

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purpose. Now, it appears to us, under these circumstances, the appellant had one of two courses to pursue — either to proceed under the decree and work it out in the Master's office, or to appeal against the decree, which, if wrong at all, was wrong altogether. Upon the whole, therefore, it is not necessary to refer to the cases which had been alluded to, where, without granting the specific relief, a court of equity granted a relief which, it was admitted, if applied to another state of circumstances, would be wholly improper. The decree which we will humbly advise her Majesty to make, will be to vary the original decree, by declaring that the accounts referred to were settled by means of a bond and bill of exchange, and ought not to be disturbed; and that that part of the bill praying that the bill of exchange should be given up, should be dismissed with costs, such costs to include the costs of the rehearing; but that the appellant ought to pay the costs of the proceedings in the Master's office, with respect to the portions of the bill so ordered to be dismissed, and no costs of the appeal.

Order accordingly.

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April 14, 1853.

Real and Equitable Assets—West Indies—5 Geo. 2, c. 5.

A was indebted to **B**, in a sum secured by **A**'s bond. **B** died, leaving **A** his executor, who accepted and acted as such. The bond continued unpaid at **A**'s death, when **A**'s books showed he had regularly entered up against himself, not only the principal but the interest, as it accrued :—

Held, in a court of equity, that the debt remained unchanged as a specialty debt, the same as if a stranger had been appointed executor.

A, seised of real estate (two plantations) in Barbadoes, was indebted to **B** and Company, a firm; and, by his will, devised such real estate to trustees, subject to his debts, and directed them to consign the crops of these plantations to **B** and Co., until debts due by him to them, should be paid off in a certain manner. **A** had previously (being indebted to **D**,) granted **D** a bond, which was still unpaid at **A**'s death. **B** and Co. claimed a preferable lien over the two plantations, or at all events to be ranked equally with **D**, and excepted to the Master's report, (which postponed them to **D**,) on the ground that **A** had, by his will, made the plantations equitable assets :—

Held, (affirming the decision of the Court of Chancery, in Barbadoes,) that the stat. 5 Geo. 2, c. 5, s. 4, made all real estate of deceased persons in the West Indies, legal assets, in such a way as to give the same priority to specialty creditors against the real estate, as they always had against the personal estate, and that it was out of the power of testator to change the legal distribution of the assets by directing an equal distribution, which the testator had attempted to do in the present case :—

Held, further, as to the preferable lien claimed by **B** and Co., though that point was open to

¹ Present—Lords Justices KNIGHT BRUCE, and TURNER, Dr. LUSHINGTON, and Sir EDWARD RYAN.

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reasonable argument, yet, as it did not seem to have been raised in the court below, it could not be entertained in the Court of Appeal.

The appellate court will not entertain a ground of appeal, however reasonable in itself, which seems never to have been submitted to the court below, at least where the case comes up on exceptions merely to the Master's report.

This was an appeal from an order made in a creditor's suit, instituted in the Court of Chancery, in the island of Barbadoes.

William Sharp, the testator, being seised in fee of two estates and plantations in Barbadoes, and being possessed of personal estate, by his will, dated at Barbadoes the 23d October, 1845, (amongst others,) devised and bequeathed the plantation called Claybury, together with the live and dead stock thereupon, as well as the whole produce which should be in, upon, or about the said plantation, and also divers other specific articles and effects, unto his son George Sharp, and his son-in-law, Thomas Francis Cox, their heirs, executors, administrators, and assigns, subject to the payment of such of his debts and legacies as should not be paid and liquidated by the means, and in the manner thereafter mentioned, upon the trusts following: First, for the benefit of his four daughters, Sarah, Henrietta, Elizabeth Clarke, and Wilhelmina, or so long as they should remain unmarried; secondly, to keep down the interest, and gradually to liquidate such of the debts and legacies as should not be paid off and discharged by the means thereafter provided for the payment thereof; and afterwards upon certain trusts therein particularly mentioned, including trusts for sale, and for the investment of the produce of such sale, after payment of the expenses, and of any debts and legacies which might then be due upon securities belonging to him, for the benefit of his said four daughters. And the testator further authorized and empowered his said trustees, George Sharp, and Thomas Francis Cox, or any trustees or trustee, for the time being, under his said will, should any of his debts or legacies, left unpaid by the means, and in the manner thereafter provided for the payment thereof, be called for at a time when they were unable to meet the payment thereof, to borrow and take up at interest as much money as would enable them to pay off and satisfy the same, and to charge his said plantation of Claybury with the payment thereof. And the testator further directed, authorized, and empowered his executors and executrixes, or any or either of them, who should qualify to his will, as soon as convenient after his death, to sell and dispose of his plantation called Brewsters, and the said piece or parcel of land, either together or separately, at or for the best price or prices that could or might be obtained, and to execute good and sufficient conveyances or assurances to any person or persons, who should contract for, or purchase the same, who should not be liable or accountable for the misapplication or non-application of the purchase-money, but the receipts of such his executors and executrixes, qualified as aforesaid, should be a good and sufficient discharge, and good and sufficient discharges for the payment of the purchase-money, or any part thereof. And such purchase-money, when received, together with all debts which might be due at the time of his death, save and except

certain debts therein mentioned, and thereby specifically bequeathed, and all other property of which he might die possessed, not therein-before mentioned, he directed to be paid and applied by such his executors and executrixes, qualified as aforesaid, in payment of the debts due from him at the time of his death, and the legacies therein-before bequeathed; and all such debts and legacies as should not be paid by the sale of his said plantation called Brewsters, the said piece or parcel of land, and other effects and property as aforesaid, he did thereby charge on his said plantation, called Claybury, with the lands, buildings, and appurtenances thereunto belonging, when his said plantation, called Claybury, should be sold, under the provisions and directions contained in that his will. And the testator appointed the said George Sharp and Thomas Francis Cox, and the said Sarah Sharp, Henrietta Sharp, Elizabeth Clarke Sharp, and Wilhelmina Sharp, executors and executrixes of his said will; and the testator, by his said will, directed that the crops of the said plantation called Brewsters, until the same should be sold, and the crops of his said plantation called Claybury, should be shipped and consigned to the mercantile firm of Higginson and Co. until the debt due from him to them should be paid off and discharged.

The testator died on 9th May, 1846, being seised of and entitled to the said two plantations called Claybury and Brewsters, and possessed of personal estate. His son, the said George Sharp, (the heir at law,) and Thomas Francis Cox, alone proved the will, and acted under it.

At the time of testator's death, he was indebted as follows: Having been indebted to Messrs. Higginson and Deane, for money lent to him by them, he had confessed a judgment in their favor, on 28th December, 1843, in the Court of Common Pleas, in Barbadoes, to secure the principal sum of 5,000*l.* at five per cent. interest, and on which day execution had issued against him. In May, 1844, having been again indebted to Higginson and Co., he confessed a similar judgment to them, to secure another sum of 5,000*l.* and interest, and execution issued on 4th May, 1844. Both the amounts covered by these judgments remained unpaid at testator's death; and he was also indebted to Higginson and Co. in a further sum, for money advanced, and for supplies furnished for the two estates. The testator was also indebted to William Tapin, to whom he had granted a bond, dated 29th March, 1825, to secure the repayment of a sum of 1,500*l.*, currency, and interest, which bond remained also undischarged, at testator's death. Tapin died in testator's lifetime, leaving a will, by which he bequeathed his residuary estate to a trustee, for the benefit of certain persons therein named, and appointed the testator, William Sharp, executor, who had duly proved the will and acted under it. The testator, William Sharp, was further indebted to the West India Bank, on a joint and several bond, to secure a sum of 3,164*l.* 15*s.* 4*d.* also unpaid.

The bill was filed in Barbadoes, in January, 1850, by the assignees of Messrs. Higginson and Deane, merchants, in Liverpool, on behalf of themselves, and all other the creditors of the said William Sharp,

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deceased, against the said Thomas Francis Cox, and others, the executors, for an account of the moneys due to them as such assignees, and of the testator's other debts; for an account of the personal estate, and of the profits of the testator's real estates there; and praying that, if necessary, from any insufficiency of the personal estate, the two said plantations of Brewsters and Claybury, might be sold in the usual way; that the produce, with the personal estate, might be duly administered; and for a receiver in the mean time. The answers of the executors having set forth that the personal estate was insufficient, a decree, by consent, was taken, on 14th November, 1850, directing the Master to take the usual accounts, and to proceed to a sale of the said two plantations.

The Master's report was dated 25th September, 1851, and contained a schedule, setting out the various debts and incumbrances, according to their legal and equitable priority. Amongst others, he found that there were three claims, which were general liens against the two plantations, and due as follows: First, to the residuary legatees, under the will of the late John Tapin, for a sum of 1,500*l.*, currency, and interest, equal to 1,938*l.* 18*s.* 10*d.* sterling, due on a bond, dated 29th March, 1825, granted by the testator, William Sharp, to the said John Tapin. Secondly, to the West India Bank, in a sum of 3,164*l.* 15*s.* 4*d.*, for principal and interest, on a judgment and execution dated 21st August, 1849, confessed by Cox, the executor of testator, upon a joint and several bond of the testator and others dated 14th November, 1845, given to the said West India Bank, to secure such principal and interest. Thirdly, to the plaintiffs, as assignees of Messrs. Higginson and Deane, for a sum of 11,075*l.* 10*s.* 10*d.*, principal, interest, and costs, confessed by Cox, as executor above mentioned, on 21st August, 1849, and on which judgment execution had issued.

To this report the defendants filed two exceptions. First, that the master had ranked the sum of 1,938*l.* 18*s.* 10*d.* as due to the residuary legatees of Tapin, by virtue of the bond before set forth, as payable out of the purchase-money arising from the sale of the said two plantations, prior and preferable to the sum of 11,075*l.* 10*s.* 10*d.* due to the complainants on the judgment confessed by Cox as above mentioned, whereas the master ought to have reported the said sum of 11,075*l.* 10*s.* 10*d.* due on the said judgment, prior and preferable to the 1,938*l.* 18*s.* 10*d.* due on the bond to Tapin, if the purchase-money arising from the sale of the plantations were legal assets; but if such purchase-money were equitable assets, then that the master should have ranked the same equally with the 1,938*l.* 18*s.* 10*d.* due on the bond; and as a further exception, the complainants alleged that the said bond became released and extinguished by reason of Tapin having, by his will, appointed Sharp an executor thereof, and who had proved the will. Secondly, that the master had ranked the said sum of 3,164*l.* 15*s.* 4*d.* due to the West India Bank under the judgment and execution thereon of 21st August, 1489, confessed by Cox as before mentioned before the said sum of 11,075*l.* 10*s.* 10*d.* due to the complainants, whereas he ought to have reported that the said two debts ranked equally.

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These exceptions came before the Court of Chancery in Barbadoes on the 20th of November, 1851. Previously to giving judgment, it was referred to the Master to ascertain whether the executors of the testator appeared to have known of the bond debt of Tapin. The Master reported that the amount of the bond debt was entered up in testator's books as against himself, both principal and interest; and moreover that the Master had the bond in his possession. The court then overruled both the exceptions; and from this decision the assignees of Higginson and Co. now appealed.

Rolt and *Prior*, for the appellants, contended that, by virtue of the direction in the will, that the crops of the estates should be consigned to Higginson and Co. until the debt due to them should be paid off and discharged, they acquired a priority over the residuary legatees of Tapin and over the West India Bank, and a right to be satisfied first out of the estate. That the debt due to Tapin had, at the testator's death, been reduced to a simple contract debt, by reason of Tapin having made the testator his executor. That the debt due to the appellant was entitled to priority over that due to Tapin's legatees, in consequence of Cox having confessed judgment; but that, at all events, it was entitled to rank equally with the other debts, inasmuch as the testator had, by his will, made his assets equitable assets. The following cases were cited: *Noell v. Robinson*, 2 Vent. 358; 2 Ch. Ca. 145; *Blankard v. Galdy*, 4 Mod. 226; *Thompson v. Grant*, 1 Russ. 450, n. (a); *Charlton v. Wright*, 12 Sim. 274; *Lyon v. Colville*, 1 Coll. 449.

Lloyd and *Clarke*, for the respondents, the residuary legatees of Tapin, and the West India Bank, who had lodged separate cases, were not called upon to address themselves to any point except the construction of 5 Geo. 2, c. 7, s. 4, and how far real estate of a person deceased in her Majesty's plantations was made equally divisible among creditors of whatever rank.¹

Rolt, replied.

The judgment of the court was delivered by

KNIGHT BRUCE, L. J. Three points have been made in support

¹ The 5 Geo. 2, c. 7, s. 4, is as follows: "That the houses, lands, negroes, and other hereditaments and real estates situate or being within any of the said plantations belonging to any person indebted, shall be liable to and chargeable with all just debts, duties, and demands of what nature or kind soever, owing by any such person to his Majesty, or any of his subjects, and shall and may be assets for the satisfaction thereof in like manner, as real estates are by the law of England, liable to the satisfaction of debts due by bond or other specialty, and shall be subject to the like remedies, proceedings, and process in any court of law or equity, in any of the said plantations respectively, for seizing, extending, selling, or disposing of any such houses, lands, negroes, and other hereditaments and real estates, towards the satisfaction of such debts, duties, and demands, and in like manner as personal estates in any of the said plantations respectively are seized, extended, sold, or disposed of for the satisfaction of debts."

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of this appeal, as to two of which we have not thought it necessary to hear the respondents' counsel. Of these two, one was the question of the effect of a will of the obligee in a bond having made the obligor his executor; and it was contended that the effect of that though not to destroy the debt, was to take away its priority as a specialty debt. We are dealing with that question only as an equitable one, and the law of the case is, on the present occasion, immaterial. We are of opinion that, in equity and in substance, the debt remains exactly as it was — exactly as it would have been if a stranger had been the executor. The second point, on which we did not think it necessary to hear the respondents' counsel, was the lien said to have been given to the house of Higginson, Irlam, and Co., for their debt, by the direction in the will to consign the produce of the testator's estate to them until their debts should be discharged. We are of opinion that that is a point open to reasonable argument. We do not, however, pronounce any opinion upon it. We do not think it necessary to say how we would have dealt with it, if the point had been properly before us; for we are of opinion that it is not so. There is not the least trace of the point having been made before the Master to whom the matter was referred, or before the court; and it would be too much to say that, when the case is before a court of appeal upon exceptions merely, a point of that description, raised neither before the Master nor before the court, should be capable of being raised in the court of last resort. That, therefore, furnishes no ground of appeal.

The remaining ground, upon which the respondents' counsel were heard, was the question of equitable assets, a question dividing itself into two branches; one, whether the effect of the statute 5 Geo. 2, c. 5, was to render the real estates equally divisible among all the creditors, of whatever rank; and, if it were not so, whether it was competent to a testator, seized of such property, to disappoint or change the legal distribution of the assets, by directing an equal distribution; which, in effect, the testator had attempted to do in the present case. We have considered the first branch of this question with all the attention due to it upon its own account; and, moreover, by reason of the manner in which it appeared to have struck a learned and distinguished judge, now deceased, before whom the point was brought, and who appeared, according to the report, to have given an opinion upon it in the case of *Charlton v. Wright*, 12 Sim. 274; a case with reference to which, however, I may say that, to the best of my recollection, the argument was not adversely conducted before that learned judge, who probably had not the benefit of such a discussion as would have taken place, if the instructions under which the counsel proceeded had been of an adverse nature, which, I think, they were not. We are of opinion that the true construction of the statute 5 Geo. 2, c. 7, s. 4, taking both branches of the 4th section together, is, that the legal priority of debts was not intended to be interfered with, and that, in making by a clause, declaratory or otherwise, real estate in the West Indies applicable to the payment of debts generally, the legislature meant to do so in such a way as to

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give the same priority to specialty creditors against the real estate as they always had had against the personal estate; and we are of opinion, on considering the whole language of the section, that it is impossible to give it with propriety or reasonableness, any other construction. Consideration, however, is due to the fact, which, we believe, is historically true, that no time has ever existed in which, in the island of Barbadoes, real estate was not assets applicable to the payment of simple contract debts. There could be no doubt that, either on the ground of treating it as a mercantile property, or treating real estate there as being merely subsidiary to trade, or on some other ground, that has been the course of proceeding in that island. Upon all these grounds, therefore, whether taken together, or whether we proceed upon the true construction of the statute alone, we have come to the conclusion that the real estate was applicable as well as the personal estate, by law, to the payment of specialty debts in the first instance, in preference to simple contract debts, and that it was not competent in the testator to disappoint the rule of law in that respect. If it had been, in this instance, he had clearly done so; but we are of opinion that it was beyond his power to do so; that it was as much beyond his power, with regard to the real estate, as it was with regard to the personal estate. In that respect, and in that sense, his real estate and his personal estate, stood on the same footing. We are of opinion, therefore, that the appeal is groundless, and must be dismissed, with costs. The fact that there are separate cases on the part of the respondents, seemed at first to give rise to some ground for remark. An explanation, however, has been given, which seems satisfactory; and the point not having been pressed against the respondents on the part of the appellants, we do not think it right to recommend to her Majesty to direct any difference to be made with regard to the costs on that ground.

Order confirmed, with costs.

C A S E S

ARGUED AND DETERMINED

IN THE

COURT OF QUEEN'S BENCH;

AND UPON

WRITS OF ERROR FROM THAT COURT TO THE EXCHEQUER CHAMBER,

DURING THE YEAR 1854.

REGINA v. DAY.

June 3, 1854.

Coroner, Election of — Qualification of Elector — Right of Common in gross.

The qualification necessary to give a vote in elections of coroners, must be a legal interest in lands amounting to a freehold.

A right of common in gross is an insufficient qualification.

A RULE having been obtained, in Hilary term, 1853, for an information in the nature of a *quo warranto* to be filed against Frederick Day, to show by what authority he exercised the office of coroner for the county of Hertford, the following case was ordered to be stated for the opinion of this court:—

On or about the 23d of May, 1852, her Majesty's writ *de coronatore eligendo* was duly issued, and directed to the sheriff of the county of Hertford, for the election of a coroner for the Hemel Hempstead district of the said county, being one of the coroners' districts, into which the said county was then divided, according to the form of the statute in such case made and provided. In obedience to the said writ, the said sheriff duly appointed his court for the said election to

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be holden, and the same was accordingly duly holden on Friday, the 4th of June, 1852, at Hemel Hempstead, within the said district, at which time and place the said election was duly proceeded with, according to law. The above-named Frederick Day, and one Edward Pope, each duly qualified to be elected to the said office, and being respectively candidates, and the only candidates, for the same office on the occasion of the said election, were, at the court so holden as aforesaid, duly submitted for election to the said office, to the electors then and there present; and the said election not having been determined upon the view at the said court, with the consent of the electors then and there present, but a poll having been duly demanded on behalf of the said Edward Pope, who was in a minority on the show of hands at the said court, a poll was duly had and taken, according to law, on the 7th and 8th of June, 1852, at the end of which, the said Frederick Day was declared by the under-sheriff presiding and taking the poll at the said election, to be duly elected, and was, in due form of law, sworn into office accordingly. At the poll so had and taken, the said Edward Pope and Frederick Day, were the only candidates for the said office, submitted to the choice of the electors entitled to vote at the said election. James Raggett, of the town of Hemel Hempstead, aforesaid, claimed to vote, and was admitted to vote, for the said Frederick Day, but was objected to by the said Edward Pope. A question has arisen between the said Edward Pope and Frederick Day, whether the said James Raggett was entitled to vote at the said election, the said Frederick Day affirming that he was, and the said Edward Pope that he was not, entitled so to vote. In the 49 Geo. 3, an act was passed, intituled 'An Act for vesting in trustees a certain tract of open pasture land, called Boxmoor, in the parish of Hemel Hempstead, in the county of Hertford, upon certain trusts, applying the produce thereof, and for better securing the rights of the respective parties entitled to the said moor.' [This act was to be referred to by either party, or by the court, on the argument, or on the decision of this case.] The tract of pasture land called Boxmoor, and other the hereditaments and premises in the said act mentioned are freehold, and situate partly in the parish of Hemel Hempstead aforesaid, and partly in the hamlet of Bovington, but entirely within the said district for which the said election took place. From the passing of the said act, up to and at the time of the said election, such parts of the said pasture land as were not demised or leased according to the provisions of the said act, were subject to the provisions of the said act, and, in pursuance of the regulations and stints in that behalf, from time to time made by the trustees for the time being acting under and by virtue of the said act, used and enjoyed for purposes of pasturage by such of the inhabitants of the parish of Hemel Hempstead, and hamlet of Bovington aforesaid as were for the time being householders of the same parish and hamlet of certain whole tenements situate therein, which were either standing at the time of the passing of the said act, or had been erected on the sites of such tenements as were so standing, and which said tenements were before and at the time of said election,

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and are now, identifiable by iron labels or tickets affixed to them. The value of such pasturage to each of such inhabitants, was, before, and at the time of the said election, about 6s. a year. During all the time aforesaid, the rivers Glade and Bulbourn, in the said act mentioned, and running through and covering several acres of the said moor, were subject to, and according to the provisions of the said act used and enjoyed for the purposes of fishing and taking fish therein, by such inhabitant householders for the time being of the said parish and hamlet as aforesaid. Subject to such user and enjoyment of pasturage and of fishing and taking of fish as aforesaid, the rents, issues, and profits of the said moor, and of the wharf and other the hereditaments and premises in the said act mentioned, were from the time of the passing of the said act up to and at the time of the said election, received by the trustees for the time being, acting under and by virtue of the said act, and have been by such trustees annually from time to time, during all that time, applied and divided, as to three fourth parts thereof, to and for the advantage of the inhabitant householders for the time being of the said parish of Hemel Hempstead; and, as to the remaining one fourth part thereof, to and for the use and advantage of the inhabitant householders for the time being of the said hamlet of Bovington.

Before, and at the time of the said election, the said James Raggett was an inhabitant of the said parish of Hemel Hempstead, and a householder of the same parish of a whole tenement situate therein, being one of the said tenements the householders whereof so used and enjoyed the said moor for the purposes of pasturage as aforesaid, and the said rivers for the purposes of fishing and taking fish as aforesaid, and was, at the time of the said election, in the actual use and enjoyment of such right of pasturage and fishing respectively, and entitled to the other benefits and advantages of the said act. The said James Raggett had not, at the time of the said election, any right or title to vote at the same election, except as hereinbefore set forth or referred to.

The question for the opinion of the court was, whether the said James Raggett was entitled to vote at the said election. If the court should be of opinion in the affirmative thereof, then it was agreed that no further proceedings should be taken; but if the Court should be of a contrary opinion, then the said Frederick Day agreed that judgment of ouster should be forthwith signed against him; it being also agreed that neither party should seek costs against the other in either event.

Foster (Kemplay was with him) for the crown. — 'The right of James Raggett to vote at the election, depends in great measure on the construction of the act referred to in the case, the 49 Geo. 3, c. 169. The effect of the provisions of that statute is, that Raggett has an interest as a householder of Hemel Hempstead, which does not amount to an equitable freehold. The land itself of Boxmoor is, by the act, section 1, vested in trustees "for the best use and advantage of the inhabitants of Hemel Hempstead and Bovington."

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By the deed-poll of 1799, recited in that section, the trustees were even empowered to sell and convey away portions of the moor. Then, section 5 vests in the trustees all produce, &c., accruing from the moor. Section 7 gives the trustees power to make by-laws modifying the enjoyment by the inhabitants. They also have powers of leasing, (section 9,) of inclosing, (section 11,) and of stinting the rights of common of the inhabitants, (section 12,) at their discretion. The inhabitants consequently have an equitable interest which does not amount to a freehold; *Davis v. Waddington*, 7 Man. & G. 37. Now, in elections for coroners, freeholders alone are entitled to vote at common law. Coke's 2d Institute, 174, Hawkins's Pl. of the Crown, b. ii. c. 9, s. 10, 1 Black. Com. 337, Dalton's Office of Sheriff, 443. The common law rules for the election of coroners and knights of the shire were the same until the 10 Hen. 6, c. 2, altered the qualification for the latter, but it left coroners eligible by freeholders having a legal freehold of any value. The 58 Geo. 3, c. 95, s. 2, first gave a vote in the elections of coroners to mortgagors and *cestuis que trust* in possession having an equitable freehold. But the 7 & 8 Vict. c. 92, s. 1, repeals that statute absolutely; section 9, speaking of persons "duly qualified to vote," means the old common law qualification of a legal freehold. Section 13, which gives the form of oath that may be administered to voters, specifies a "freehold estate;" and section 19 again speaks of freeholders. Raggett has not even an equitable freehold; and if he had, he would still not be qualified to vote. Then, as to the right of common possessed by the inhabitants under the Local Act, that is insufficient to give a vote, for it is a common in gross, and not appendant, and that is an insufficient qualification. Dalton's Office of Sheriff, p. 333, Elliott's Registration of Electors, p. 34. The right of fishing under the Local Act is of the same nature as the right of common. The Boxmoor by-laws have established a stint regulating the user of these rights, and those by-laws may be modified at the discretion of the trustees. The trustees may determine to agist cattle on the moor, and apply the rents to the best use of the inhabitants, instead of continuing them in the enjoyment of the commonable rights. Under any circumstances, the right to these *profits à prendre* depends on inhabitancy, and Raggett may be a mere weekly tenant, so that his interest as commoner can give him no qualification.

Lush, contra, (*Bramwell* was with him.) First, Raggett has an equitable interest, amounting to a freehold in point of duration, for he has, under the local statute, an interest in Boxmoor so long as he continues an inhabitant of Hemel Hempstead, and that falls precisely within the class of interests of uncertain duration, which Lord Coke classes among freeholds; Co. Litt. 42, a. During the inhabitancy the interest is indefeasible, for the Boxmoor trustees are bound to hold the land for the best use of the inhabitants — section 1; and the indentures specifying the trusts show that the trusts are to continue as long as inhabitancy. This interest, therefore, being determinable on an uncertain event, amounts to a freehold, *Besson v.*

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Burton, 12 Com. B. Rep. 647; s. c. 14 Eng. Rep. 276. By section 13, of the local act, it is transferable from one inhabitant to another. Secondly, Raggett has a legal estate of freehold in the common and fishery, though the freehold of the soil may be in the trustees, and the restrictions which may be imposed on his enjoyment of those rights do not make them the less a legal tenement. It is true these are rights in gross, but the authority of Dalton is insufficient to show that they therefore do not form a qualification. *The King v. Dersingham*, 7 Term Rep. 671, shows that the holder for life of common in gross has a freehold. There is no reason for the distinction between common in gross and appendant.

[Lord CAMPBELL, C. J. You cannot say there is no distinction. The land to which common appendant is annexed makes it more valuable, and so a better qualification.]

COLERIDGE, J. According to Dalton, an advowson is no qualification.]

An advowson is only a right of presentation, and no interest in the land. But a commoner disseized had an assize, 1 Com. Dig. tit. "Common," and that involves the assumption that his interest was a freehold. But this is something more than an ordinary common in gross; it is a peculiar right created by the local act. The lands vested in the trustees were purchased with the money of the inhabitants for whose benefit they are held, and against whom there is no right to approve. Thirdly, assuming that Raggett had only an equitable interest, freehold in point of duration, that was a sufficient qualification. It is a mistake to suppose that the 58 Geo. 3, c. 95, created the right of equitable owners in possession to vote in elections of coroners. Persons having an equitable interest, freehold in point of duration and coupled with possession, were within the common law rule giving a qualification to "freeholders," that word denoting the quantity of interest and the kind of tenure. The object of the 58 Geo. 3, c. 95, was not to give such persons a vote, but rather, as its language shows, (section 2,) to exclude trustees not in possession. The oath given by that statute requires mortgagors and *cestuis que trust* to swear that they are "freeholders," so that the word is not confined to legal estate.

[COLERIDGE, J. That oath is given in a section preceding the section conferring a vote on equitable interests, and the oath can be tendered to "freeholders" only.]

It cannot be that mortgagors in possession were to evade the oath altogether. There is complete absence of authority to show that "freeholder" in the old authorities and in the statutes had reference to any thing but tenure and quantity of interest.

Foster replied, and cited Heywood on County Elections, 105.

Lord CAMPBELL, C. J. I am of opinion that James Raggett was not entitled to vote. It is clear that his right to vote depends on the common law, for the 58 Geo. 3, c. 95, on which statute alone he could rely as giving him a qualification, has been repealed. What,

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then, is the right to vote at common law? It was the same in elections of coroners as in elections of knights of the shire, that is, a legal as opposed to an equitable interest was requisite in either case to give the right of voting. The 7 & 8 Will. 3, c. 25, created a qualification for certain equitable interests as far as elections of knights of the shire were concerned, but in elections of coroners the qualification remained as at common law, and a legal estate and interest were requisite until the 58 Geo. 3, c. 95, created a qualified right of voting in favor of certain equitable interests. That statute being repealed, the matter is remitted to the old common law rule. As to the right of common which is here relied on as being a legal interest sufficient to form a qualification, it is, at the utmost, a right of common in gross, which, according to Dalton's high authority, gave no right to vote in elections of knights of the shire, nor consequently in elections of coroners. It follows that judgment of ouster must be signed against Mr. Day.

COLERIDGE, J. I am of the same opinion. If the right of *cestuis que trust* to vote in elections of coroners was created by the 58 Geo. 3, c. 95, that right is destroyed by the repeal of the statute conferring it. Now, independently of the older authorities, the frame of that statute shows that it was intended to confer a new right, and not merely to declare an existing right in *cestuis que trust*, while it excluded trustees, as contended by Mr. Lush. The provisions excluding trustees and mortgagees from the right to vote were inserted because those persons would have been included under the term "freeholders," to whom the statute gave a qualification; and then the legislature went on to create a qualified right in mortgagors and *cestuis que trust* in possession. Dalton's authority is express to show that, at common law, James Raggett's interest was insufficient to give a vote.

ERLE, J. I am of the same opinion. The legal interest relied on to entitle Raggett to vote is a common in gross, which according to Dalton is insufficient. The equitable interest relied on, even if it were freehold, would probably give him no right to vote; but it is not shown to be a freehold, for it is dependent on by-laws which may alter or redeem it at the discretion of the trustees.

Judgment of ouster.

Oswald v. The Mayor, &c., of Berwick-upon-Tweed.

IN THE EXCHEQUER CHAMBER.

OSWALD v. THE MAYOR, &c., OF BERWICK-UPON-TWEED.¹

May 10, 1854.

Principal and Surety — Municipal Corporation — Treasurer — Change of Tenure in Office — Liability of Surety.

The Municipal Corporation Act, 5 & 6 Will. 4, c. 76, s. 58, provides, that the council of every borough shall, in every year, appoint a treasurer of the borough, and shall take such security for the due execution of his office as they shall think proper, and in case of a vacancy, by death, resignation, removal, or otherwise, may appoint another person in his place. By section 60, the treasurer shall, at such times during the continuance of his office, or within three months after the expiration of it, and in such manner as the council shall direct, duly account for money received. By the statute 6 & 7 Vict. c. 89, s. 6, the above-mentioned provision, that the council shall, in every year, elect a treasurer, is repealed, and it is enacted, that the council of every borough shall, on the 9th of November, next after the passing of the act, appoint a treasurer, who shall thenceforth hold his office during the pleasure of the council for the time being; and in case of a vacancy, the council shall, within twenty-one days after, appoint a fresh one. Subsequent to the month of November, 1841, M. was appointed treasurer for the remainder of the year, to November, 1842, if the council should so long please. On the 9th of November, 1842, he was elected treasurer again, and continued in office for the year, until the 9th of November, 1843, when he was again elected to be treasurer, (the statute 6 & 7 Vict. c. 89, having then come into operation,) during the pleasure of the council for the time being. He remained treasurer down to June, 1848. On his first election, he entered into a bond, with sureties, who bound themselves for his duly accounting for and due payment of moneys received "during the whole time of his continuing in the said office, in consequence of the said election, or under any annual or other future election." In 1848, when he ceased to be treasurer, there were certain sums which he had received since the 9th of November, 1843, and which he had not duly paid over:—

Held, in an action against a surety, by a majority of the court, that the change made by the statute of Victoria, in the tenure of the office from that of an annual appointment to an appointment during pleasure, did not exempt the sureties from liabilities, as the duties were not altered, and they had agreed to be bound for his conduct as treasurer, not only during his first election, but under any annual or other future election.

THIS was a writ of error from the judgment of the Court of Queen's Bench, in favor of the plaintiffs below, on a demurrer to a plea in an action of covenant.

The pleadings,—set out in the report below, 22 Law J. Rep. (N. S.) Q. B. 129; s. c. 16 Eng. Rep. 236,—are, together with the argument, sufficiently stated in the judgments of the different judges. The case was argued (Jan. 19) by

Unthank, for the plaintiff in error; and by

Manisty, for the defendants in error.

Cur. adv. vult.

¹ *Coram* JERVIS, C. J., POLLOCK, C. B., PLATT, B., ALDERSON, B., MAULE, J., CRESSWELL, J., WILLIAMS, J., and MARTIN, B.

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As their lordships were not agreed in opinion, separate judgments were given.

MARTIN, B. This is a writ of error upon a judgment of the Court of Queen's Bench. The declaration was upon a deed dated the 15th of January, 1842, which recited that at meetings of the town council of the borough and town of Berwick-upon-Tweed, held on the 21st of December, 1841, and the 11th of January, 1842, certain resolutions were agreed to relative to the office of treasurer of the borough, and, amongst them, that the treasurer should find securities for the due execution of his office in the sum of 2,000*l.*, and that at one of these meetings a person named Murray had been elected the treasurer. The deed then proceeded to state that the said Murray and the defendant and certain other persons, as cautioners, sureties, and full debtors with Murray, bound themselves jointly and severally to the plaintiffs to pay to them all sums of money which Murray should receive "in virtue of his said appointment as treasurer as aforesaid, during the whole time of his continuing in the said office, in consequence of the said election, or under any annual or other future election of the said council to the said office. The deed then proceeds to provide for the due execution by Murray of his said office, and for his attention to its duties during his continuance in office, and limited the liability, by reason of it, to 2,000*l.* The declaration then alleged, that Murray became treasurer by virtue of the election mentioned in the deed, and that by virtue of an election made on the 9th of November, 1842, and other subsequent elections, he continued treasurer until the 24th of June, 1848; that he received various sums of money by virtue of his office; and for a breach alleged that he had not paid these moneys to the plaintiffs. To this declaration there were several pleas; to two of them, (the sixth and seventh,) there were demurrers. Upon the argument the seventh was abandoned by the learned counsel for the plaintiff in error, and the only question argued before us was the validity of the sixth plea. The sixth plea stated, that the election of Murray to be treasurer, as mentioned in the deed, and also his election on the 9th of November, 1842, were made under and in pursuance of the 5 & 6 Will. 4, c. 76, (the Municipal Corporation Act,) and that on the 9th of November, 1843, he ceased to be treasurer under and by virtue of either of these elections. That, on the 9th of November, 1843, in pursuance of the 6 & 7 Vict. c. 89, he was elected by the town council to be treasurer, to hold the office during their pleasure. That after the 9th of November, 1843, he never held the office of treasurer, save under the election made in pursuance of the statute last mentioned, and that he had duly accounted for all money received by him prior to the 9th of November, 1843, or under or by virtue of his office as treasurer under his elections in pursuance of the 5 & 6 Will. 4, c. 76; and that the money mentioned in the breach was received by him after the 9th of November, 1843, and after his election under the 6 & 7 Vict. c. 89. The arguments and judgments in the court below are reported in 1 E. & B. 295, and that court was of opinion that the plea was bad, and gave judgment for the plaintiffs

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below. I am of opinion that this judgment was right, and that it ought to be affirmed. By the statute 5 & 6 Will. 4, c. 76, s. 58, it was enacted, that the council of every borough should, in every year, appoint a fit person, not being a member of the council, to be the treasurer of the borough, and that they should take such security for the due execution by him of his office as they should think proper. This was the enactment which was in force when Murray was first elected treasurer, and continued to be so at the time of his second election in November, 1842. The 6 & 7 Vict. c. 89, received the royal assent on the 24th of August, 1843, and by the 6th section, after reciting that the office of treasurer for boroughs was one of great trust, and that an annual appointment to such office was inconvenient and unnecessary, it was enacted, that so much of the 5 & 6 Will. 4, c. 76 as enacted that the town council should, in every year, appoint a treasurer, should be repealed, and that the council of every borough should, on the 9th of November then next, appoint a fit person, not being a member of the council, to be the treasurer of the borough, who should thenceforth hold his office "during the pleasure of the council for the time being." The plea averred that Murray was elected treasurer on the 9th of November, 1843, under and in pursuance of the last-mentioned statute, and the argument on behalf of the plaintiffs in error was, that this was not an election within the true meaning of the deed declared on so as to render the defendant, who was a surety, liable for the non-payment, by Murray, of the money received by him under or by virtue of his office, created by, or consequent upon such last election. There is no doubt as to the rule of law to be applied to cases like the present.

It was laid down in *Arlington v. Merricke*, 2 Wms. Saund. 403, and has been professed to be adhered to ever since. If the deed declared on, had recited the election of Murray in the beginning of 1842, as being under the 5 & 6 Will. 4, c. 76, and been generally for the due payment, by Murray, of all money received by him during his holding the office of treasurer, then, according to the rule laid down in the above case, the obligation created by the deed, would not have extended to any money received by Murray after the 9th of November, 1842; but it was quite competent for the town council, by using apt words for the purpose, to take a security, creating an obligation upon the surety to secure the due payment by Murray of all moneys received by him as treasurer, so long as he should be elected to, and hold the office. There is nothing illegal in the town council taking such continuing security; and the real and only question in the case is, whether they have done so by the deed declared on? It is my opinion that they have. I apprehend there could have been no doubt that, if the election had continued to be annual, the obligation created by the deed, would also have continued. The words of the deed are express, that the liability of the defendant should continue during the whole term of Murray's continuing to fill the office, in consequence of the then late election, or under any annual or other future election. These words seem to be as precise and clear as words can be. By the statute 6 & 7 Vict. c. 89, however, the election and office ceased

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to be annual, and the office became one to be held at the pleasure of the town and council. The office, however, remained the same, with all its duties and emoluments unaltered, and the only alteration made was that, instead of being an annual office, it became one from which Murray was removable at the pleasure of the council. I fully agree that if any additional or increased risk would have been thereby cast upon the defendant, (the surety,) his liability would have been determined, but, in my opinion, no such additional or increased risk was created. On the contrary, assuming the town council to do their duty, (and I have no right to assume they would not,) I think it was an alteration much to the advantage of the surety, by giving the council a more direct and immediate control over the principal (Murray); so also, if it could be collected from the terms of the deed, that the liability of the surety was to be conditional upon Murray holding an annual office, the responsibility would have ended on the 9th of November, 1843, and the plea would have been good; but no such intention is to be collected from the terms of the instrument. Indeed, if it had appeared that the consideration for the covenant by the defendant was to have been the continued appointment of Murray to the annual office, I should have thought that the liability was determined, but nothing of the kind appears from the statement of the deed, as set out in the pleadings. The only question, therefore, as it seems to me, is, does the case fall within the words of the deed? This instrument provides, not merely that the defendant should be answerable for the due payment, by Murray, of all money received by him in consequence of his first or any other "annual election;" but, in consequence or by reason of any "other future election" of him. Now, Murray has been elected treasurer by a future election, not an annual one; and the case falls directly within the words of the deed. In my opinion, also, it falls within its spirit, which, I think, was, that the defendant should continue a surety so long as, and (as the deed itself expresses) during the whole time Murray remained treasurer of the borough, and whether his election was annual or otherwise. I, therefore, see no reason why full effect should not be given to the words of the deed. My judgment is in accordance with what I consider to be the true rule of law in regard to the construction of every written contract, namely, to give effect to the plain and ordinary meaning of the words and language used according to their common sense and signification, as they would be understood by a person of intelligence reading the documents. For these reasons, I think the judgment of the Queen's Bench ought to be affirmed.

WILLIAMS, J. I am of opinion that the judgment ought to be affirmed. With respect to the seventh plea there is, I believe, no difference of opinion among the judges; I shall, therefore, say nothing upon it. With respect to the sixth, I think the judgment of the Court of Queen's Bench is right. The intention appears to me to be clear, from the language of the condition of the bond, "that the council should take prospectively a security for the good conduct of the treasurer, as long as he continued in office in consequence of any

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recent or future election by the council, for any period or tenure whatever." The language, "during the whole time of my continuing in the said office in consequence of the said election or any annual or other future election," admits of no other interpretation, as it seems to me, if construed in its ordinary acceptation. The question then is, whether such a construction is inconsistent with any declared intention of the parties, to be collected from the recital or any other parts of the instrument. In *Arlington v. Merricke*, and the long series of cases of which that is the leading one, the intention was regarded as apparent in the recital that the suretyship was to last for one year only; and as this was inconsistent with certain words used in the condition, if construed indefinitely, it was allowed to control them, by confining their generality within the limits expressed or necessarily to be implied in the recital. But, in the present case, looking to the whole instrument, it is plain, in my judgment, that the apparent intention of the parties is carried into effect by construing the words of the condition according to the ordinary acceptation. And if this be so, even if it be shown, which I by no means concede, that the liability of the sureties has been increased by the reëlection *durante bene placito*, under the statute 6 & 7 Vict., it is plain this could not justify the court in relieving them.

MAULE, J. I agree with my brother Martin as to what the state of the record is, and what the question is that is raised in it; namely, whether the sureties continue liable under the circumstances disclosed in the sixth plea. It appears to me that they do not continue liable, and consequently that the judgment of the Court of Queen's Bench ought to be reversed. The terms of the bond are, that the sureties are to be liable during the continuance in office of the treasurer by virtue of his appointment, in consequence of the late election, or under any annual or other future election. It is clear that it was the intention of the parties that the liability of the sureties might not be limited to the first year; for it is manifest, from the words which they have used, that they contemplated a continuance in office beyond the first year; but I think that the parties, and people in general, are to be considered as contracting with reference to the state of the law that existed at the time of the contract. I by no means affirm, or think, that by sufficiently expressed words people may not bind themselves under a state of law which does not exist at the time of the contract entered into, if they choose so to express and do express themselves so as to leave that pretty clear. But, generally speaking, persons are to be considered as contracting upon the assumption that the law will remain such as it is; that if an office is to be appointed to in a certain manner, the appointment shall continue to be in the same persons, and be of the same quality and the same duration. There would be nothing, that I am aware of, illegal, if the parties to this contract had said that the sureties should continue liable, notwithstanding any change that might be made by any act of parliament in the tenure or nature of the duties of the office of treasurer; only I think people are not to be presumed to have so contracted, unless

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they express themselves so. One reason for the ordinary presumption that people contract with reference to the law as it stands is, that it would be very indiscreet and foolish to do otherwise. Those who think that the judgment of the Court of Queen's Bench was right, must think this: that the parties to this contract contemplated that some alterations might be made with respect to the office of treasurer, and intended that, notwithstanding that alteration, the liability of the surety should continue the same. Now discreet and sensible people would be extremely unlikely to do that, even if the qualification were added, that the liability shall continue notwithstanding an alteration in the office, provided that alteration does not affect the liability of the sureties. I think any discreet and prudent person would say: "Let me judge for myself; let me see the act of parliament which is to alter the nature and tenure of the office; and let me judge, and not leave it to others to judge, whether the liability of the surety for an officer with such duties, and to be so appointed, is to be affected, and whether I choose to continue my liability with respect to him; I am content that, as long as the office is on its present footing, I will continue to be surety." No discreet person would, I think, bind himself in the manner in which it is said these sureties did bind themselves.

If, however, any person for some direct consideration had thought fit so to bind himself, I think he would have expressed himself by some other means than by means of an inference to be gathered from this simple word "other." Now, it appears to me that, although for certain purposes, as we stated in the court below, an office may be said to continue the same if its duties continue the same, although the tenure may be altered, I do not think that, for the purpose of this discussion, and the construction of this deed, that can properly be affirmed. For the main object with respect to this deed being to give security for the conduct of the officer, the office certainly does not continue the same with respect to the point of view in which it would be looked upon by the parties to this instrument, although the duties might continue the same, if the liability of the sureties or the risk of the sureties may be increased: and it appears to me very clearly that the alteration that is made by the statute of Victoria in the mode of appointment to this office, is an alteration that does greatly increase the risk of the sureties. The Statute of Will. 4, the Municipal Corporation Act, section 58, enacts, that in every year the council shall elect, amongst other officers, a treasurer. Therefore, a treasurer could not continue in office more than till some time in the next year after his election, unless a majority of the council thought fit to take upon themselves in the second year to appoint him again. Unless they do that positive act of appointing him again, he ceases to be treasurer, and the sureties cease to be liable.

Now, the alteration made by the statute of Victoria is this: that he is to hold during the pleasure of the council; that is to say, when they have once appointed him, he is to hold for life, unless the town council will meet together and a majority can make up their minds to the positive act of removing him. Now, anybody can see

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that it is very much more likely that a person's office will continue, if it be a doubtful point whether he ought to retain the office or not, (he being a person, perhaps, deservedly beloved and respected by the members of the council,) if they have to meet to turn him out; for many persons, who, if they were called on by their votes once a year to say, we think this man is a fit person to be continued in office, would not so continue him — would not bring themselves to make up their minds at the time to remove him, if it required a positive act of removal, as it does under the Statute of Victoria. It seems to me that that is a substantial alteration in the risk of the sureties. That point of view was not, I think, suggested in the court below, and was not, certainly, considered in the judgment; but according to the language of the judgment of the court below, if the tenure of the office (comprehending, as I understand the word as used there, the mode of appointment) be altered ever so much, the office is the same if the nature of the duties continue the same. I admit that for some purposes it would be the same office, but I am of opinion it is not for the purposes of this bond, if the risk of the sureties is increased. According to that argument in the court below, and the principle of that judgment, and of those who are disposed to affirm it here, if the statute of Victoria had provided that an appointment should be, not during the pleasure of the council, but for life, during which the treasurer should not be removable at all, that would not alter the nature of the duties of the office, but it would very much alter the liability and risk of the sureties, and yet that would not relieve them from responsibility, according to the principle laid down in that judgment. I think, therefore, it is very clear that after the making of this bond, and before the transactions out of which this action arises, there was an alteration in the office, such as, supposing the parties to the instrument to be actuated by reasonable principles, they would consider as making a material difference in their liability, and, therefore, such as they would have been very unlikely to have intended to contract.

Now, the main, or I rather should say the sole, argument that is urged in support of the construction that considers the parties to this instrument as having intended to be bound in the event of alterations made by act of parliament in the condition of the office, is this: that the word "other" is not otherwise to be satisfied; that it will be an idle word if you do not give it the employment of affording an inference that the parties intended to be bound in the event of an alteration of the law to be made by some statute, though in what respect they do not point out, or affect in any way to anticipate. If that were so, is it not the case that in bonds or legal instruments, whether in the Scotch or English form, you are to treat it as a *reductio ad absurdum*, that either such a sense is the sense of the instrument or that a word may be superfluous? It constantly happens that words are superfluous, that they are inserted frequently to provide for some possible event which the persons using the words will not take the trouble to consider, and if they do consider, which they may think very doubtful whether it will ever arise. They

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think that the words can do no harm; but it would be by no means safe to use such words in future, if you are to give them so much effect as is sought to be given on this occasion. And, supposing it were that you could find no other employment for the word "other," I think it so much more a probable thing that people may have used a superfluous word than that persons should have intended to bind themselves with respect to the conduct of an officer to be appointed in some way that they do not know how, and whose duties they did not know but that they might be altered. It may be true enough, in point of law, that an alteration of the duties would quite make the office a different one, and so they would not be bound, yet no cautious person would leave that to inference; and it is extremely unlikely that any person drawing up a legal instrument would leave that to be inferred without expressly saying, if such was their intention, that they meant not to be bound if there was an alteration of substance by any subsequent act of parliament. It seems to me that it would be very much more likely that people should put in such a word as the word "other" without any distinct meaning, than that they should put it in intending thereby to make this alteration: that, whereas, without that word, they would not have been bound except as long as the office continued just in the state in which it was at the time of the contract, that by the insertion of that word they meant to say that they intended to be bound, notwithstanding any alteration, or at least notwithstanding many alterations, the nature of which they do not define, and some of which, like the one in question, would make a serious difference in their risk. It is very improbable, I think, that people having such an intention should express it only by that word.

But, then, I think the word has ample employment without finding it such extravagant work to do as is suggested by that construction. The 58th section of the Municipal Corporation Act provides, with respect to treasurers, that they shall be elected in the year. It does not say that they shall be elected on a particular day, but that they shall be elected in every year. Well, then, suppose a treasurer is elected at the end of 365, or in leap-year 366, days from the former appointment, the office is very little short of a year or a little more than a year; then, in order to exclude the construction and the quibble, Oh! that is not an annual office, because he was elected for those periods, it might be extremely proper to insert "or other future election." It would be enough, also, to put the case, supposing the statute required an election on a particular day, and that day was the same for every year, and the charter day had slipped by, such an omission as that may be supplied, and is supplied; but if it were not for the provision "annual or other future election," it might be said that the charter day was passed, and though there was a subsequent election under a *mandamus*, it might be contended by the obligors, that as the charter day was passed they were responsible only in the event of an annual election. The answer to that would be, that they had said annual or other election.

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The bond certainly does not begin by reciting (in former days probably it might have done so) the mode in which the officer under the then statute law was to be appointed. It assumes the state of the statute law is so and so, and then provides that if the person continues under an annual election, or under an election that is not strictly annual, if it is a continuance in office, the circumstance of the election not being strictly annual is not intended to alter the liability of the surety. That, I apprehend, is a reasonable, and fit, and proper office to be performed by the word "other," and I think that that may be, and ought to be, substantially understood in the way that I have proposed. Inasmuch, therefore, as this construction which is put on the instrument renders the sureties liable in an event such as they are not likely to have contemplated, and such as it is not reasonable and just to suppose that they contemplated, — inasmuch as they have not expressed it in the manner in which it is reasonable to suppose, if they had intended it, they would have expressed it, — and inasmuch as the expression "other," from which so strong an inference is sought to be drawn, will not support that inference, and may perfectly be accounted for by giving it an employment more suitable to its own use, — I think that the judgment ought to be reversed.

CRESSWELL, J. The question depends upon the meaning to be given to the condition of the bond executed upon the original appointment of David Murray to the office of treasurer of the borough of Berwick-upon-Tweed. The condition is, that Murray and his sureties are bound for the due payment of all moneys which "I, the said David Murray, shall or may recover or receive in virtue of my said appointment as treasurer as aforesaid, during the whole of the time of my continuing in the said office, in consequence of the said election, or under any annual or other future election of the said council to the said office." After some annual elections under the 5 & 6 Will. 4, c. 76, he was reëlected, on the 9th of November, 1843, under the 6 & 7 Vict. c. 89, to hold the said office during the pleasure of the council; and the question is, whether it was a reëlection within the meaning of the condition of the bond. The condition requires, that the money to be accounted for should be received "in virtue of his said appointment as treasurer;" that relates to the nature of the office. It remained precisely the same after the passing of the statute of Victoria. The money now claimed was, therefore, received in virtue of his said appointment as treasurer. Each of the reëlections of Murray was immediately on the termination of the period for which he had been previously elected. His tenure of office was, therefore, continuous, and the money was received while he continued in the said office of treasurer. But he did not continue in office under any annual election; he was in under another election, under the statute 6 & 7 Vict. c. 89; and the question is, whether it was another future election within the meaning of the condition of the bond. It has been contended, that as the election to hold during pleasure could not have been made when the bond

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was executed, such election being first sanctioned by the 6 & 7 Vict. c. 89, it could not have been within the meaning of the parties; but it is also to be remarked, that, under the 5 & 6 Will. 4, c. 76, s. 50, the council could only elect annually, or on a vacancy occasioned by death, resignation, removal, or otherwise, and then another person was to be reëlected; so that the same person could only be reëlected by an annual election, and the word "other" was inapplicable to any election under that statute. Bearing this in mind, and that the words are large enough to include a reëlection, whether under the statute then in force, or any other that might be enacted, and that the manifest object of the parties, was, to avoid the necessity of giving fresh bonds on every reëlection, I think we cannot do otherwise than hold that the reëlection under the 6 & 7 Vict. c. 89, was another future election within the meaning of the condition of the bond.

It is said that the risk of the sureties will be increased: that is mere conjecture. On the one hand, parties may be unwilling to remove a party, although they would not vote for his reëlection; but, on the other hand, it may be said that a treasurer elected for a year, cannot be removed without proof of his misconduct during the year; but, if during pleasure, any conduct of that sort may be sufficient to procure his removal, for the protection of his sureties. This argument, therefore, leads to no certain conclusion, inasmuch as it operates both ways; and I think we must hold that the election during pleasure was an election within the meaning of the condition, and that our judgment must be for the plaintiffs below, and that the judgment of the Queen's Bench is right.

ALDERSON, B. The question arises on the true construction of a covenant in a bond, under which the plaintiff in error became surety with other persons, for the due accounting of one Murray, who had been elected treasurer of the town of Berwick. The deed, after reciting Murray's election to that office, provided that the sureties should pay all moneys received by Murray, by virtue of his appointment of treasurer, during the whole time of his continuance in that office, in consequence of the said election, or under any annual or other future election. Now, what is the contract here? In the first place, it is a contract to answer for Murray only during his continuance in office, though, it is true, under successive elections. If, therefore, he ceased to be continuously reëlected, the liability of the surety was at an end. In the second place, the office was, at the time of the covenant, described as an annual office, and therefore, according to the case of *Arlington v. Merricke*, the covenant would, if it stopped there, bind the sureties only for the first year, and would cease to bind after the termination of that year. But, according to what is admitted in the case of *The Liverpool Waterworks Company v. Atkinson*, 6 East, 507, it is clear that a larger responsibility may be created by the words of the covenant, if their proper and reasonable construction would warrant it. Now, here the words added are, "or under any annual or other future election." These, therefore, embrace two cases beyond the first annual election for which, in the first place,

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the sureties bound themselves. They divide themselves into two branches, "under any annual" or "future election," which would extend their liability to all other annual elections under which he might become treasurer thereafter; and, in the second place, the words are, "under any other future election." Now, as I think, the natural meaning of these words, is, "any future election other than annual," or "whether annual or not." The necessity for the elections being continuous, seems to me a strong reason for holding this to be so. For a vacating of the office in the middle of any year followed by a reëlection immediately of the same person, seems a contingency not at all reasonable to calculate upon, as a ground for not giving to the words, "or other future election," their ordinary and natural meaning. But, then, it is clear that the duties of the office and the mode of accounting must not be varied. For, if so, the office is not the same, and the liability of the surety then also will be at an end; the clause in the deed only provides for an alteration in the tenure of the office, but not in the nature and duties of the office itself. Now, to apply all this to the present case. By the statute 5 & 6 Will. 4, c. 76, the office was made annual, and the duties defined. By the statute 6 & 7 Vict. c. 89, the duties remain unaltered, but the officer must be elected during pleasure. No alteration was, therefore, made, except as to the period of holding it, and this alteration seems to me provided for by the very term of the covenant. Nor do I see that the liability of the surety is increased. It is said that it is one thing not to reëlect, and another thing to remove. But, then, *per contra*, a new power of removal is given at any intermediate time, and is not confined to the expiration of the annual period alone. This argument operates, therefore, for one side as for the other. Here, then, I think that there is no reason why we should construe the words otherwise than according to their plain and natural import; and, if we do so, then the sureties still remain liable. The judgment of the Queen's Bench is therefore right, and should be affirmed.

PARKE, B. I am of opinion that the judgment of the Court of Queen's Bench ought to be affirmed. The pleadings have already been adverted to sufficiently. The Court of Queen's Bench gave judgment for the plaintiff, and a writ of error was brought on that judgment. In the argument before us, it was conceded that the objection to the seventh plea was valid, and that the judgment of the Court of Queen's Bench could not be questioned in that respect. Upon that part of the case there is no doubt. But the counsel for the plaintiff in error relied on the goodness of the sixth plea. Under the statute 5 & 6 Will. 4, c. 76, the town council of every borough was directed to appoint, on the 9th of November in every year, a fit person, not being a member of the council, to be the treasurer of the borough, and to take security for the due execution of his office of treasurer, as they should think proper; and in case of vacancy, by death, resignation, removal, or otherwise, they were to appoint another fit person. D. Murray, the treasurer, was appointed on the 9th of November, 1842, under this act. In the year 1843, the statute 6 & 7

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Vict. c. 89 passed; which, reciting that the annual appointment to the office of treasurer was inconvenient and unnecessary, enacted, that on the 9th of November, then next, the council of each borough should appoint a fit person to hold the office during the pleasure of the council, and that on the happening of any vacancy thereafter, by death, resignation, a motion, or otherwise, the council should appoint a successor. D. Murray was again appointed on the 9th of November, 1843, under this act, to hold the office at pleasure. D. Murray's defaults, in respect to which the action was brought, all occurred since this appointment; and the question raised by the sixth plea, is, whether these defaults come within the meaning of the condition of the deed-poll. It is perfectly clear, as Lord Campbell states in his judgment, that according to the authority of *Arlington v. Merricke*, and numerous subsequent decisions, the liability of the sureties of D. Murray, for his subsequent defaults, would have ceased to exist on the 9th of November, 1842, the end of the year of the first appointment, however long he might have continued to hold the office of treasurer, if to the words, "during the whole time of my continuing in the said office, in consequence of the said election," there had not been added the further words, "or under any annual or other future election of the said council to the said office." The question mainly turns on the construction of these words. It is perfectly clear, that these words are intended to extend the liability of the obligors beyond the moneys received by the treasurer, by virtue of the appointment then made. They apply to all received by him during the time of his continuing in office in consequence of that election, or any other future one. The meaning of the word "appoint," which, if it stood alone, would have been confined to the appointment recited, is extended by the context to every future renewed appointment by a new election.

There cannot be any doubt that it was competent for the council, in order to obviate the expense and trouble of having fresh bonds at subsequent periods, to take a bond for the faithful discharge of the duties of the office of treasurer, not for one year only, but for any number of years, or any number of periods, whether successive or not, during which he might serve the same office, or, indeed, any office under them at any future time. Of the legality of the bond to that effect, no question can arise. The only questions are, first, as to the meaning of the additional words in this case: whether they extend to appointments made under the subsequent act of parliament which are not annual, but for an indefinite time, at pleasure. And, secondly, whether the office, after the passing of that act, is to be considered the same office as that in respect of which the bond was given. I am of opinion, on both points, in favor of the defendants in error. I think, that the meaning of the words clearly is, that if the person elected fill the same office continuously, (for the use of the word "continue" shows that it was not intended to apply to disconnected appointments at future periods,) no matter by what species of election or appointment, whether annual or any other, quarterly, monthly, or at pleasure, the obligors are to be bound for the faithful discharge of the duties of his office.

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Whether the parties really contemplated the alteration by a new statute of the provisions in the statute of Will. 4, requiring the election to be annual or not, I do not think it necessary to inquire. It is not, indeed, a very probable supposition, that they meant to provide for the case of an appointment other than annual under the then existing law, either on the ground that the statute of Will. 4, was directory only, and such an appointment would, therefore, if made by the council, though in violation of their duty, be not invalid; or on the ground that the treasurer might resign his office in the middle of the year, and yet immediately afterwards change his mind, and wish to resume it, and immediately be lawfully reëlected for the remainder of the year. Whether the parties did or did not actually contemplate such change by a new statute, I think that they have clearly expressed their intention that any future alteration in the period of the tenure of the office, however made, and whether it required a future law or not, should make no difference in the liability of the obligors, provided the appointment was in continuance of the former one. The obligors bind themselves, that if such alteration should actually occur, however it might happen, they would be responsible.

The only remaining question is, whether the nature of the office, and its functions, as well as the period of its tenure, are changed by the statute 6 & 7 Vict. c. 69, for then it would not be the same office to which he was originally appointed, and the sureties would have a different liability, from what they stipulated for. I am of opinion that its nature, functions, and duties, continue precisely the same under the statute of Victoria as they were under the statute of Will. 4. It is still the office of treasurer of the borough, and is described in the statute of Victoria as the same office as before. The duties in the receipt of money are the same; the mode of accounting is the same. The statute 5 & 6 Will. 4, c. 76, ss. 59, 60, 93, 126, states the duties of treasurer. The statute 5 & 6 Vict. c. 89, makes no difference in them. The sections continue in full operation. By section 60 of the former statute, the treasurer is to account during his continuance in the office, or within three months after its expiration, in such manner and at such times as the council shall direct. The statute of Victoria makes no difference whatever in this respect; he is still to account only whenever the council shall direct. There is no difference, then, in the duties of the office which can affect the sureties. It is very true, however, as was argued before us, that there is a difference, so as to affect the sureties since the passing of the 6 & 7 Vict.; for under the former statute, 5 & 6 Will. 4, the treasurer, if he misconducted himself, might not be reëlected at the end of the year, and so the sureties would be released from their responsibility for a subsequent year. But under the statute 6 & 7 Victoria, the office being held during pleasure, the same degree of misconduct might not induce the council to dismiss him, as would have prevented them from reëlecting him. Again, there is a difference as to the chance of his being called to account by the council, where he is annually reëlected, and where he holds continuously at pleasure; as it might reasonably be supposed that, before they reëlected, they

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would probably order him to account. But these differences arise, not from an alteration of the duties, but merely from the alteration of the tenure of the office, from its being made an office during pleasure, instead of for a certain period; and any difference of tenure is provided for by the stipulation, that the deed shall apply to the office of treasurer, whether that office is executed pursuant to an annual or any other future appointment by the council, including an appointment at will. I am of opinion, therefore, that as the alteration of tenure of the office is contemplated, and provided for by the deed, and as the nature, functions, and the duties of the office, irrespective of the tenure of it, are the same, the judgment of the Court of Queen's Bench is right, and ought to be affirmed.

POLLOCK, C. B. I have the misfortune to differ from the judgment of the court below, and from the majority of the judges who compose this court. The pleadings have been so fully and repeatedly stated, that it is unnecessary to state the facts of the case, or the pleadings, or to do more than advert to the grounds of my dissent. I think, the expression in the bond, "or under any annual or other future election," does not include the case of an election under the statute which passed after the date of the bond, and which enabled the council to elect a treasurer who should continue in office during their pleasure, and who might therefore continue for life, instead of a year, if not displaced. I think every contract, which does not expressly provide to the contrary, must be considered as made with reference to the existing state of the law, and is to be construed with reference to that state of the law; and if by the intervention of the legislature, a change is made in the law, which in any degree affects the contract, such contract made without some clear and distinct reference to the prospect or possibility of a change in the law, does not hold with reference to the state of things as altered by the new law. I am not aware that there is any authority which expressly decides this, but also I am not aware that there is any authority to the contrary. The matter must be decided as a matter of plain good sense as to what do people refer when they enter into a contract; and I think, on principle, the intervention of the legislature, in altering the situation of the contracting parties, is analogous to a convulsion of nature, against which parties no doubt may provide; but if they have not provided, it is generally to be considered as excepted out of the contract. It is said, that this is within the language used. It may be so; but if it be, in my judgment that language was used with reference to the law as it stood when the contract was made, and not with reference to the state of the law as altered by a subsequent act of parliament. The expression any "annual or other future election," would clearly, as the law stood at the date of the bond, mean any election for a year or any term less than a year; and the word "other" has abundance of meaning without its referring to a change of the law. And it is to be observed, that the treasurer, at his first election, was elected for nine months only, and this election for nine months is actually recited in the very

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bond itself. The point on which I differ is this: any language used in a contract must, in my judgment, be construed with reference to the state of the law when the contract was made. No doubt, parties may contract with reference to a change of the law, but those who seek to construe an agreement are bound to make out affirmatively that this was meant by the contracting parties, and it must clearly appear from the language so used that it was so meant. *Prima facie*, I think it is to be presumed, as intended, that the contract refers to the existing state of the law; and I think there are no words, nor any expression from which I can reasonably draw the conclusion, that the sureties intended to bind themselves under a change in the law, which would seriously alter the responsibility, as the election for life most undoubtedly does, contrasted with an annual election, as my brother Maule has most clearly, and I think unanswerably, pointed out. I think, therefore, the judgment ought to be reversed.

JERVIS, C. J. I am also of opinion that the judgment ought to be reversed. Two points were made in this case. It was first contended that the bond was applicable to the treasurer's first year of office only, and for this *Arlington v. Merricke* and *The Liverpool Waterworks Company v. Atkinson* were cited; but it seems to me that the words of the condition answer this objection, and show that the bond was not intended to be confined to the first year of office only. The condition is, that the principal shall well and truly pay to the mayor, &c., all rents, sums of moneys, penalties and other moneys which he shall receive in virtue of the said appointment as treasurer as aforesaid, (referring to his election for part of the year until the 9th of November, which had been recited in the bond,) during the whole time of his continuing in the said office, in consequence of the said election, or under any annual or other future election of the said council to the said office. If the condition had stopped at the words "in consequence of the said election," there would have been nothing to show that it was intended to extend beyond the then current year; but the words "or under any annual or other future election of the said council to the said office," clearly show that the parties had in view an election after the 9th of November, referred to in the recital, by which the treasurer might be continued in his office, and for his good conduct in which office they intended to be responsible. It would be a very refined construction to hold, that the sureties merely engaged that the treasurer should, whilst he continued treasurer under the first appointment, or under any annual or future election, account only for those moneys which were due during the first year, and received by him in consequence of his appointment as treasurer as aforesaid; that is to say, until the 9th of November.

The principal question is, whether the tenure of the treasurer's office having been altered by statute after the bond was given, the obligation continues, and I am of opinion that it does not. When the bond was given, the office of treasurer was regulated by the statute 5 & 6 Will. 4, c. 76. By the 58th section of that act, the office

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of treasurer was an annual office, to be appointed, that is, by election, on the 9th of November in every year, by the council of the borough. The sureties, therefore, had a right to expect, that if their principal misconducted himself in his office, he would not be reëlected. On the 9th of November in every year he would cease to hold the office, unless he had a proposer and seconder, and a majority of those who were then present at the council, in his favor. It was some security to them that the council must take active measures in reappointing the treasurer if the sureties were to continue liable. Before the alleged breach of this bond took place, the tenure of the office of treasurer had been altered. It was then regulated by the statute 6 & 7 Vict. c. 89, the 6th section of which enacted, "that on the 9th of November, then next, the treasurer should be elected by the council, and after such election should thenceforth hold his office during the pleasure of the council for the time being." It is clear, that this statute made a very considerable difference in the position of the sureties. Under the former statute, the treasurer lost his office on the 9th of November, unless a majority of the council were satisfied with his conduct, and took active steps in his behalf: by the new law he continued in office, unless a majority took active steps against him. In the former case, many might forbear to act from suspicion or mistrust; in the latter, few could be influenced to remove an officer from his situation without strong evidence of misconduct. The difference between a reappointment and a removal is too striking to require further observation.

But it is said, that we are bound to give effect to every word of the bond, and that the words "other future election," pointing to an election other than an annual election, which alone could take place under the first statute, must have some meaning, and were intended to apply to any election which might thereafter take place, whether under the then existing or any other statutes. I agree that this is a safe rule of construction, but it must be taken with some qualification. We must not violate the intention of the parties for the mere purpose of complying with technical rules. Now, surely when parties enter into a contract they must, unless they express themselves clearly to the contrary, be understood to make their engagement with reference to the law and facts as they then are, and not to speculate upon matters which they cannot foresee, and which, not then being in existence, they cannot understand. In my opinion, the sureties intended to guarantee the faithful conduct of the treasurer whilst he continued such officer, under any annual or future election, which might take place in the office, as it then was regulated by the statute 5 & 6 Will. 4, c. 76, and no more, and when I am told that in that case no effective meaning is given to the word "other," I answer, that words of that and a similar import are daily used in instruments of this nature from abundant caution, and that it is not at all improbable that the draftsman may have inserted that word to avoid all question, should the office be determined in the middle of the year, or should the officers, from unforeseen circumstances, be elected on any other day than the 9th of November, in which case the election would not be an annual

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election. For these reasons, I am of opinion, that the judgment ought to be reversed; but the majority of the court being of a contrary opinion, the judgment will be affirmed.

Judgment affirmed.

REGINA v. THE DERBYSHIRE, STAFFORDSHIRE, AND WORCESTERSHIRE
JUNCTION RAILWAY.

May 31, 1854.

Company — Execution against Shareholder — Elegit — Mandamus to inspect Register — Misnomer.

A judgment creditor of a railway company, within the operation of the "Companies Clauses Consolidation Act, 1845," is entitled to issue execution against a shareholder, under section 36, although he has before issued an *elegit* against the lands of the company, but such lands are insufficient to satisfy the judgment debt; and the court granted a *mandamus* to compel the production of the register of shareholders for his inspection.

Where a company was incorporated as the "D., S., and W. Junction Railway," and a *mandamus* had issued directed to them by the name of the "D., S., and W. Junction Railway Company," the court, upon the argument of the *mandamus*, ordered the name to be amended.

MANDAMUS. The writ, which was directed to "The Derbyshire, Staffordshire, and Worcestershire Junction Railway Company," recited that the defendants were incorporated by "The Derbyshire, Staffordshire, and Worcestershire Junction Railway Act, 1847," which incorporated the "Companies Clauses Consolidation Act, 1845;" and that the said company had taken divers proceedings towards the execution of the purposes therein mentioned, and had raised money by calls, and had, since their incorporation, incurred divers debts, in particular a debt of 1,572*l.* to one J. Addison, for which judgment had been recovered and signed by the said J. Addison, against the said company, in the Court of Exchequer, on the 22d of June, 1853; and that 800*l.* was due and payable under the said judgment, and the said J. Addison was entitled to levy the same by execution; that the said J. Addison had endeavored to levy the said 800*l.* against the property and effects of the said company, and for that purpose had issued a *fi. fa.* and an *elegit* against the company, and had endeavored to levy the said sum on the said respective writs, but had wholly failed therein, "and there hath not been and cannot be found sufficient property and effects of you, the said company, whereon to levy such execution, and the said sum of 800*l.* still remains wholly unpaid and unsatisfied." The writ then recited that Addison was desirous of issuing execution against the shareholders of the said company to the extent of their shares respectively not paid up, and of obtaining an order of the Court of Exchequer for that purpose; and, for the purpose of obtaining such order and issuing such execution, was desir-

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ous of inspecting the register of shareholders in the said company, for the purpose of ascertaining the names of such shareholders, and the amount of capital remaining to be paid on their respective shares; and that he had required the defendants to produce to him the said register of shareholders for the purpose aforesaid, which they had refused to do. The writ then commanded the defendants to produce to the said J. Addison the said register of shareholders, and to allow him to inspect the same for the purpose of ascertaining, &c., or that they show cause to the contrary, &c.

The return stated that the defendants were incorporated by the name of "The Derbyshire, Staffordshire, and Worcestershire Junction Railway," and not by any other name; and further stated that, under the *elegit* in the writ mentioned to have been issued by the said J. Addison, the sheriff, duly and according to law, caused to be delivered to the said J. Addison, at a reasonable price and extent in that behalf, five closes of land, situate, &c., of and in which the defendants were seized in fee at the time of entering up the said judgment, to hold to him, the said J. Addison, and his assigns, according to the form of the statute, until the sum of money and interest in the said writ of *elegit* mentioned, should be thereof levied; and that the said sheriff had, before the issuing of the writ of *mandamus*, duly returned the said writ of *elegit*; and that the said execution had not been in any way reversed, annulled, or vacated, but still remained in full force.

Plea, that the several closes of land in the return, mentioned to have been delivered to the said J. Addison by the said sheriff, were found to be, and were, of the yearly value of 10s. in the whole, and no more, as, by the return to the said writ of *elegit*, would appear; and that the yearly interest alone upon the said judgment debt, was of far greater amount than the entire yearly value of the said closes; and that, by reason of such insufficiency of value, it became, and was impossible for the said J. Addison to levy his said execution and obtain satisfaction of the said sum of money, and interest in the said *elegit*, mentioned, from and out of the lands of the said company; and that the said J. Addison, in consequence thereof, did not enter into or take the actual possession of the said closes, or any of them, or any part thereof, nor did he bring any action of ejectment for the recovery of the actual possession thereof, or any part thereof, but had declined and refused so to do.

Demurrer and joinder in demurrer.

Hill, for the defendants.¹ The question is, whether Addison is a person "entitled to execution" within the meaning of the Companies Clauses Act, 8 Vict. c. 16, s. 36. It is submitted that he is not, since he has issued an *elegit* against the land of the company. The rule of law is, that where lands have been extended under an *elegit*, that

¹ He took a preliminary objection that the writ was directed to the company by a wrong name, their corporate name being the "Derbyshire, Staffordshire, and Worcestershire Junction Railway;" but the court directed the writ to be amended in this respect.

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is a satisfaction of the judgment, and no further execution can be had except by a fresh *elegit* on newly-discovered lands. *Blumfield's case*, 5 Rep. 87; *Foster v. Jackson*, Hob. 52; and *Underhill v. Deveaux*, 2 Wms. Saund. 68. This rule applies, though there be different parties; *Crawley v. Lidgeat*, Cro. Jac. 338. It follows that a creditor who has issued an *elegit*, is not within the meaning of the 36th section of the Companies Clauses Consolidation Act. That section contemplates the case of such execution only being issued against the company as will satisfy only part of the judgment claim, and leave the creditor a further right to levy execution. If the creditor, of his own accord, issues an *elegit*, which is a satisfaction, he cannot have further execution against the shareholders, and is not entitled, therefore, to inspect the register.

[CROMPTON, J. This is not a common law execution, but a statutory mode of getting satisfaction after the company's property has been exhausted.]

It was not necessary to issue this *elegit* in order to entitle Mr. Addison to the statutory remedy. *Field v. M'Kenzie*, 4 Com. B. Rep. 705; and *Dodgson v. Scott*, 2 Exch. Rep. 457.

Hayes, contra. The question is as to the reasonable construction of the 8 Vict. c. 16, s. 36. This writ of *elegit* was issued in consequence of a doubt recently thrown out by the Court of Exchequer, whether shareholders could be applied to before an *elegit* had been issued against the company's lands. The judgment is not satisfied or discharged by the *elegit* issued, because you may have a fresh *elegit* against lands in another country. (He was then stopped by the court.)

LORD CAMPBELL, C. J. The complainant, Mr. Addison, is entitled to have the register of shareholders produced for his inspection. The 36th section of the Companies Clauses Consolidation Act, allows execution to be issued against the shareholders, if there cannot be found property of the company "sufficient whereon to levy" the execution issued against them. "Sufficient," means of such amount as to satisfy the judgment. The facts disclosed on the pleadings to this *mandamus*, show that Mr. Addison's judgment claim is not and cannot be satisfied by the lands extended, and, therefore, the shareholders are liable to satisfy it.

ERLE, J. I am of the same opinion. The Companies Clauses Consolidation Act has clearly been complied with. The intention of the act was, that the property of the company should be sought for and exhausted before the shareholders were applied to, and there is nothing in the case of an *elegit* issued against the company different from any other kind of execution, so as to deprive the judgment creditor who has had recourse to it from the statutory remedy against the shareholders. The debt is not satisfied, although an *elegit* has issued, since a fresh *elegit* can always be had against other lands.

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CROMPTON, J. The common law distinctions between executions of different kinds should not be imported into the interpretation of a new statutory remedy such as this. The question in every case is, whether the property of the company has been sought for in the first instance, and whether the judgment creditor is still unpaid.

Judgment for the plaintiffs.

JUDKINS v. ATHERTON.

June 15, 1854.

Practice — Common Law Procedure Act — Default in proceeding to Trial — Notice by the Defendant — Entering Suggestion — Signing Judgment.

A defendant is entitled to enter a suggestion on the record, and sign judgment for his costs under the 101st section of the Common Law Procedure Act, 15 & 16 Vict. c. 76, where a plaintiff neglects to try a cause at the times mentioned in the section, and to proceed to trial at the assizes or sittings, occurring immediately after the expiration of the twenty days' notice to try, which by the section the defendant is enabled to give.

Notice of trial was given for the summer assizes, and the plaintiff at the assizes withdrew the record. On the 21st of February following, the defendant gave notice, requiring the plaintiff to bring on to trial the issue joined in the action at the next assizes at Liverpool, the commission day of which was the 21st of March. The defendant did not proceed to trial as required by the notice, and the defendant, on the 5th of May, entered a suggestion on the record in the terms of the 101st section, and signed judgment for his costs: —

Held, that the defendant had properly entered the suggestion and signed judgment.

THIS was an action for breach of covenant. The action was commenced in 1852. In December, the defendant pleaded payment into court of 10*l*. In January, 1853, issue was joined, and notice of trial given by the plaintiff for the next assizes. The cause was not taken down for trial at those assizes. Another notice was given for the following summer assizes, and the cause was taken down for trial, but the plaintiff withdrew the record. On the 21st of February last the defendant gave notice, in pursuance of section 101 of the 15 & 16 Vict. c. 76,¹ requiring the plaintiff to bring on to trial the issue

¹ Section 101. "Where any issue is or shall be joined in any cause, and the plaintiff has neglected or shall neglect to bring such issue on to be tried, &c., whether the plaintiff shall in the mean time have given notice of trial or not, the defendant may give twenty days' notice to the plaintiff to bring the issue on to be tried at the sittings, or assizes, as the case may be, next after the expiration of the notice; and if the plaintiff afterwards neglects to give notice of trial for such sittings or assizes, or to proceed to trial in pursuance of the said notice given by the defendant, the defendant may suggest on the record that the plaintiff has failed to proceed to trial, although duly required so to do, (which suggestion shall not be traversable, but only be subject to be set aside if untrue,) and may sign judgment for his costs; provided, that the court or a judge shall have power to extend the time for proceeding to trial, with or without terms."

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joined in this action at the next assizes at Liverpool. The commission day at Liverpool was the 21st of March. The plaintiff did not proceed to trial as required by this notice; and the defendant, on the 5th of May, entered a suggestion on the record in the terms of the 101st section, "that the plaintiff had failed to proceed to trial, although duly required so to do," and signed judgment for his costs.

Pearson, obtained a rule, calling upon the defendant to show cause why the suggestion entered on the record, and all subsequent proceedings, should not be set aside.

Cowling, showed cause. The notice was served more than twenty days before the commission day at Liverpool. On the other side, it will be said that it ought to have been served thirty days before the assizes, or twenty days before the day for the plaintiff giving full notice of trial, the meaning of the word "afterwards," in the 101st section of the Common Law Procedure Act, being, after the expiration of the twenty days' notice. But that cannot be the proper construction of the section. "Afterwards," clearly means after service of the twenty days' notice. At common law, the defendant must have either waited a year or carried down the record by proviso. That practice caused expense and delay, and led to the passing of the 14 Geo. 2, c. 19, allowing of a motion for judgment as in case of a nonsuit, in answer to which a very slight excuse used to be enough for a peremptory undertaking to try at the next assizes or sittings. The present act was meant to put an end to this practice, and to put the defendant in the same situation after he had given notice, as if he had taken down the record for trial by proviso, and twenty days' notice was ample for every purpose. It is twice the time allowed for giving full notice of trial.

Pearson, contra. The word "afterwards" in the section refers to the last antecedent, the bringing the issue on to be tried at the assizes after the expiration of the twenty days' notice; and the meaning is, that the plaintiff shall have time to give notice of trial after the expiration of the twenty days, otherwise he is not to be considered as being in default under the section. The neglect afterwards "to give notice of trial" is made a default by the section, which shows that there should be time for giving such notice after the expiration of the twenty days' notice.

LORD CAMPBELL, C. J. I think the construction contended for by the defendant's counsel is the reasonable and correct construction of the section. "Afterwards," means after service of the notice by the defendant requiring the plaintiff to proceed to trial. After that, if the plaintiff does not proceed to trial, he is to be in the same situation as a plaintiff formerly was who did not proceed to trial after giving a peremptory undertaking to try.

COLERIDGE, J. I am of the same opinion. If you consider what

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goes before in the section, the construction seems clear. The plaintiff is to be required by a twenty days' notice to bring the issue on to be tried at the assizes or sittings next after the expiration of the notice; and I should say upon those words that the plaintiff was bound to go to trial at the assizes or sittings occurring next after the expiration of that notice, without reference to any further time. Then what follows in the section is quite clear. If the plaintiff afterwards neglects to do what by the notice he has been required to do, namely, what is necessary to bring the case on for trial at the next assizes or sittings, the defendant may enter a suggestion, and sign judgment.

ERLE, J. I am clearly of the same opinion. The defendant is required to give notice twenty days preceding the assizes or sittings at which the case is to be tried, and within the twenty days the plaintiff is to give notice and proceed to trial, otherwise the defendant may enter a suggestion and sign judgment. A strong reason against the plaintiff's construction is, that in London ten days' notice of trial is not required, and it may only be four days' notice where the parties are under terms of short notice of trial.

CROMPTON, J., concurred.

*Rule discharged.*¹

REGINA v. THE OVERSEERS OF KINGSWINFORD.

May 8, 1854.

Watching and Lighting Act—Notice of Meeting—District Chapelry—Persons usually calling Parochial Meetings—Nullity of Proceedings—Distress.

In the parish of K., a district for ecclesiastical purposes had been assigned under the 1 & 2 Will. 4, c. 38, to the chapel of B., for which chapel wardens were appointed, but they had authority only in ecclesiastical matters, all parochial business of the district being always transacted by the church-wardens of K. at large. A notice convening a meeting for the purpose of considering whether the 3 & 4 Will. 4, c. 90, (the Watching and Lighting Act,) should be adopted in the B. district, was upon a requisition of the rate-payers of the district issued by the district chapel wardens. The meeting was held and the act adopted in the district; and inspectors were appointed, who made orders on the overseers of K., to levy certain sums of money for the purposes of the act. The overseers having neglected to obey these orders, an application was, more than two years after the adoption of the act, made to justices for a distress warrant against the overseers, but they refused to issue it:—

Held, that the act had never been legally adopted in the district, as the notice for convening

¹ An application was made to be allowed to give a peremptory undertaking to try at the next assizes, but it was refused without an affidavit of merits.

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the meeting could only be properly given under the act by the church-wardens of the parish at large, who were the persons usually calling meetings on parochial business, and that consequently the justices were not bound to issue their distress warrant : —

Held, also, that the whole of the proceedings being void, the objection was open, notwithstanding the time which had elapsed.

THIS was a rule calling upon the overseers of the poor of the parish of Kingswinford, in the county of Stafford, and on two justices of that county, to show cause why the said two justices should not issue their warrant to levy by distress and sale of the goods of the said overseers, certain sums of money ordered to be raised by the inspectors appointed under the 3 & 4 Will. 4 c. 90, (the Watching and Lighting Act,) for the district of Brierly Hill, in the said parish.

It appeared by the affidavit upon which the rule was founded, that a district within the parish of Kingswinford had been assigned for ecclesiastical purposes, under the 1 & 2 Will. 4, c. 38, to a chapel called St. Michael's, Brierly Hill, and that two chapel wardens were annually elected for the district. On the 12th of August, 1851, a requisition, duly signed by three rate-payers of the parish inhabiting within the district, was sent to the chapel wardens of Brierly Hill, requiring them to convene a meeting of the rate-payers of Brierly Hill, for the purpose of determining whether the provisions of the 3 & 4 Will. 4, c. 90, should be adopted in the district. The chapel wardens of the district accordingly, within ten days after the receipt of this requisition, gave a notice convening a meeting for the 25th of August, 1851. This notice was affixed on the door of the chapel of Brierly Hill. On the 25th of August, the meeting was held, and the provisions of the act, so far as relates to lighting, were unanimously adopted; and, at the same time, twelve inspectors were appointed, and the amount of money to be raised in the year by them was fixed. On the 12th of February, 1852, a notice of the adoption of the act was published by the chapel wardens in the same manner as the notice convening the meeting. The inspectors afterwards issued orders to the overseers of the parish of Kingswinford, requiring them to levy the sums of money specified in those orders. On the 18th of November, 1853, a complaint was made by the inspectors to a justice, that the overseers had not levied the moneys in obedience to the orders, and a summons having issued, the overseers appeared in answer to the complaint before two justices, who, however, refused to issue their distress warrant.

The affidavits, in answer to the rule, stated that the chapel wardens of Brierly Hill district, were appointed only for ecclesiastical purposes, and that no parochial notices were ever served by them, but that all the parochial business of the parish of Kingswinford, including the Brierly Hill district, was always transacted by the overseers of the parish of Kingswinford.

Hill and *Cowling*, now showed cause. The 3 & 4 Will. 4, c. 90, has never been legally adopted in the district of Brierly Hill. It is not disputed that there may be an adoption of the act by a district within a parish, if the proper steps are taken for that purpose. Sec-

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tion 77, defines "parish" as meaning a part of a parish, and "the powers given to a church-warden, shall be understood to be given to any chapel warden, &c., usually calling any meeting on parochial business;" but the chapel wardens of the district have no powers in respect of parochial business. It does not clearly appear whether the district has been assigned to St. Michael's, Brierly Hill, under section 10, or section 23, of the 1 & 2 Will. 4, c. 38. If under the former section, the powers of the chapel wardens are, by section 16, limited to matters connected with the chapel, and they have no authority in the district. If it be under section 23, the chapel wardens to be appointed for the district, are, by section 25, to "do all things pertaining to the office of church-warden, as to ecclesiastical matters." Therefore, either way, these chapel wardens could not have, as, in fact, they have not, any powers in regard to parochial matters not ecclesiastical. For instance, the chapel wardens could not make a rate for the district. Such powers, including that of giving the notice of meeting under the 3 & 4 Will. 4, c. 90, s. 5, must be exercised by the church-wardens of the parish at large. Section 73 expressly provides for the church-wardens of a parish calling a meeting of the inhabitants of a part only. [There were other objections urged against the rule; but, as the court gave no opinion upon them, the argument upon them is omitted.]

Keating and Bros, in support of the rule. It is conceded by the other side, that the act may be adopted by part of a parish. If, in all such cases, the church-wardens of the parish at large are bound to give the notice, the expression in section 77, that the powers given to a church-warden shall apply to "a chapel warden, &c., or other person usually calling any meeting on parochial business," would be unnecessary.

[LORD CAMPBELL, C. J. In this case, the persons usually calling parochial meetings in the district, are the church-wardens of the parish.]

Then, the provisions of the act having been adopted in 1851, it is too late now to raise this objection as to the form of the proceedings. In *The Queen v. Deverell*, 3 E. & B. 372, s. c. 25 Eng. Rep. 160, the same objection was taken and overruled.

[ERLE, J. There, in the absence of affirmative proof of the proceedings being wrong, we acted on the maxim of presuming them to be rightly done.]

LORD CAMPBELL, C. J. How do you say the legality of the adoption of the act is to be questioned?

By appeal under section 66. Where an appeal is given by statute, it is the sole mode of questioning proceedings; and, unless there be some limit in point of time, the greatest uncertainty may arise from the proceedings being ripped up *ab initio* after the money has been partly levied.

[LORD CAMPBELL, C. J. If a proceeding is wholly void, it need not be appealed against.]

CROMPTON, J. And section 66 applies only to matters done after

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the adoption of the act, not to the adoption itself. Supposing you avowed for the distress, you must state all the proceedings, including the adoption of the act, and those averments would be traversable.]

LORD CAMPBELL, C. J. I am of opinion that this rule should be discharged. It is necessary to show that the order of the inspectors is good, before we can be called upon to direct the justices to issue a distress warrant. Now, the first objection made to it is fatal, and we need not, therefore, notice any of the others. That objection is, that the act has never been properly adopted. It has been argued, indeed, that this objection is not now open, and I should have been glad to find that the legislature had drawn a limit, after which, such an objection could not be taken, but I do not find any such provision. The appeal clause has been relied on for this purpose. But that section supposes that the statute has been lawfully adopted. If it has not been adopted, every thing done is treated as null and without jurisdiction. Therefore, this objection is, I think, still open; and if so, it is conclusive, because it seems to me that the chapel wardens could not give this notice. There is clear language, saying that it shall be given by the persons "usually calling any meeting on parochial business." These chapel wardens were not such persons, and, therefore, had no power to call the meeting. What powers they have, are confined to ecclesiastical purposes, and their proceedings were, therefore, wholly void.

WIGHTMAN, J., concurred.

ERLE, J. The question is, whether these district chapel wardens are within sections 5 and 73, as interpreted by section 77. I think they are not such church-wardens as are there referred to, because, according to the affidavit, they do not fall within the class of persons usually calling meetings on parochial business. It might seem reasonable that when the inhabitants of part of a parish are about to adopt this act, the officer of that part should be the person to act; but there is an express provision in section 73, that the officer of the parish at large is to act for the part, and therefore the argument from supposed convenience falls to the ground. For these reasons, I draw the conclusion that the church-wardens of Kingswinford are the proper persons to call the meeting; and the notice not having been duly given, all the rest of the proceedings fail, and the objection is not cured by lapse of time.

CROMPTON, J., concurred.

Rule discharged.

Tress v. Savage.

TRESS v. SAVAGE.

June 20, 1854.

Landlord and Tenant — Ejectment — Agreement to Let for Three Years — Void Lease — Notice to Quit.

Under an agreement to let for three years, though it is void as a lease for three years by the statute 8 & 9 Vict. c. 106, s. 3, the tenant holds from year to year, subject to the terms of the agreement, and is bound to quit at the expiration of the three years, without a previous notice to quit.

EJECTMENT. On the trial, before Alderson, B., at the last Spring assizes, at Kingston, it appeared that the premises sought to be recovered had been let by the plaintiff to the defendant, under an agreement in writing, dated the 17th of December, 1850, whereby the plaintiff agreed to let to the defendant, and the defendant agreed to hire of him the premises in question, "to hold the same unto the said John Savage for the term of three years, to be computed from the 25th of December instant, yielding and paying unto the said Cooper Tress, the annual rent of 48*l.*, to be paid monthly, on the 25th day of each month in the year, the last payment whereof to be made on the 25th of November, 1853." The defendant occupied the premises under the agreement for the whole term of three years, and paid all the rent due. At the end of the term the defendant refused to quit the premises, no notice to quit having been served upon him; and it was contended at the trial that the lease to the defendant not being by deed, was void under the 8 & 9 Vict. c. 106, s. 3, and that consequently the defendant held as tenant from year to year, and was entitled to the usual notice to quit before the action was brought. The learned judge decided otherwise, and a verdict was entered for the plaintiff, with 15*l.* damages, for the mesne profits down to the time of signing final judgment, but leave was reserved to the defendant to move to enter a nonsuit; and in the following term a rule *nisi* for that purpose was obtained,¹ against which

June 19. *Lush* showed cause. The agreement, no doubt, was rendered void as a lease by the 8 & 9 Vict. c. 106, s. 3, but still it is to be considered as regulating the terms of the holding; and the terms, therefore, being at an end, under the agreement, the defendant was not entitled to a notice to quit. Though a lease, for however short a time, unless by deed, was void under the 7 & 8 Vict. c. 76, s. 4, it was to be considered as an agreement for a lease, so as to

¹ A rule *nisi* was also moved for, to reduce the damages, on the ground that the Common Law Procedure Act, 15 & 16 Vict. c. 76, s. 214, only permitted evidence to be given of the mesne profits down to the time of giving the verdict. But the rule on this ground was refused, Lord Campbell, C. J., saying, "When it was agreed that judgment should be stayed to afford an opportunity of moving to enter a nonsuit, was it not understood that mesne profits should be calculated down to final judgment?"

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enable either party to compel specific performance in equity; and under sections 1 and 2 of the Statute of Frauds, though an agreement to let for more than three years was ineffectual as to the duration of the term, it was taken as regulating the terms of the holding in other respects. *Doe d. Rigge v. Bell*, 5 Term Rep. 471; *Doe d. Bromfield v. Smith*, 6 East, 530; *Doe d. Tilt v. Stratton*, 4 Bing. 446.

[CROMPTON, J., referred to *Doe d. Davenish v. Moffatt*, 15 Q. B. Rep. 257.]

That case is a strong authority, though decided upon the repealed statute, 7 & 8 Vict. c. 76.

[COLERIDGE, J. There is a marked difference between that statute, and the statute in question. The former extended to all leases in writing, and made them void as leases, but agreements in writing to let were to take effect as agreements for leases; whereas section 3 of the subsequent statute is restricted to such leases as are required by law to be in writing with reference to the Statute of Frauds, and enacts that they shall be void at law if not by deed, and gets rid, altogether, of the effect before given to agreements.]

The object of section 3 of the 8 & 9 Vict. c. 106, was to do away with the inconvenience of agreements being treated as leases in equity. Only such an effect will be given to the words "void at law" as is necessary to carry out the intention of the legislature. The section does not make the instrument void for all purposes; and it would lead to great inconvenience to hold that the terms of it were to have no effect. The intention merely was to render it void as a lease, but not as evidence of the terms of the holding. *Malins v. Freeman*, 4 Bing. N. C. 395; *Lincoln College Case*, 3 Rep. 59, b.

Pearson, in support of the rule. The 8 & 9 Vict. c. 106, s. 3, is different, in its language, from the previous statute, and expressly provides, in general terms, that an instrument like the present shall be "void at law." That clearly shows the intention to have been to make the instrument ineffectual for all purposes. Suppose the agreement of lease was for a long term of years, it would be strange to hold that the terms regulated the holding.

[ERLE, J. Only such of the terms would apply as were consistent with a tenancy from year to year.]

CROMPTON, J. The instrument, though void, is evidence of the terms of the new parol letting from year to year, created by the receipt of the rent, so far as it is consistent with a tenancy from year to year. The rule of law is well laid down in *Berrey v. Lindley*, 3 Man. & G. 498, 514.]

This is a question of the construction of the statute which enacts generally that the instrument shall be "void at law." *Doe d. Davenish v. Moffatt* was under the repealed statute, which did not contain such a general enactment. He referred also to *Laythorpe v. Bryant*, 2 Bing. N. C. 735; *Crosby v. Wadsworth*, 6 East, 602; and *Burton v. Reeve*, 16 Mee. & W. 307.

Cur. adv. vult.

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The judgment of the court¹ was now delivered by

COLERIDGE, J. In this case there was a taking by writing, and the question was, whether notice to quit was necessary to determine the tenancy. The argument turned a good deal on two statutes, the 7 & 8 Vict. c. 76, repealed by the 8 & 9 Vict. c. 106. By section 4 of the first of these statutes, it was enacted that no lease or writing shall be valid as a lease or surrender unless the same shall be made by deed. In *Doe d. Davenish v. Moffatt*, which was decided on this clause, the agreement was executed on the 18th of September, 1845, for three years from the 29th of September; and, in that respect, it was exactly like the present case. It there provided that the tenant might renew the tenancy on giving six months' notice. The same question arose there as in this case, and the court held that he was not tenant from year to year indefinitely, but for three years, liable to be turned out during that period, by a notice, and that, at the end of the three years, the tenancy expired by effluxion of time. Now, under the statute 8 & 9 Vict. c. 106, s. 3, a lease required by law to be in writing, shall be void at law unless made by deed. It appears to us that the intention of the legislature in both statutes was clearly the same, to prevent leases being made except by deed. The first statute was found to have done this imperfectly, in point of excess, because it embraced all leases whatever, and, in point of provision, because, (as was pointed out in argument,) instead of taking away the enjoyment under the lease, it made it an agreement for a lease, and sent the party into equity to enforce that agreement. The second statute intended to remedy these defects, and it provides that parties shall not make a lease which is required by law to be in writing, (that is, with reference to section 2 of the Statute of Frauds,) except by deed, and it makes all such leases not by deed void as leases, but it leaves all other matters just as before. The tenant, in this case, seems to us to stand in the same position as the tenant in *Doe d. Davenish v. Moffatt*. He has no lease or tenancy for three years. During that time he may be turned out by a notice, but if he stays until the end of that time, both parties have agreed, and there is nothing in the statute to prevent their doing so, that the tenancy shall then expire by effluxion of time. My brother Wightman entertained some little doubt during the argument; but my brothers Erle and Crompton agree in the opinion which I have just stated.

WIGHTMAN, J. I had some doubt yesterday, as to the effect of the second statute, but, on consideration, I have come to the same conclusion as the rest of the court.

Rule discharged.

¹ COLERIDGE, J., WIGHTMAN, J., ERLE, J., and CROMPTON, J.

Vidi v. Smith.

VIDI v. SMITH and another.

June 15, 1854.

Patent Law Amendment Act—Infringement of Patent—Rule for an Account to be kept by Defendant—Jurisdiction of Common Law Court.

Under the Patent Law Amendment Act, 15 & 16 Vict. c. 83, where an action has been brought for the infringement of a patent, a retrospective account of the defendant's sales and profits of the patented article will not be granted before final judgment. Neither does the act give power to order an inspection of the defendant's books containing entries relating to such sales. But, upon reasonable evidence of the existence of a valid patent, and of its having been infringed by the defendant, and of the defendant's making a profit by such infringement, the defendant will be ordered to keep an account of all sales to be made of the article alleged to be an infringement of the plaintiff's patent, and of the profits thereon, until the further order of the court, upon condition of the plaintiff's waiving all right to more than nominal damages at the time of the action, and undertaking, in case the verdict and judgment should be in favor of the defendant, to pay to the defendant the expense of keeping such account.

RULE, under the 15 & 16 Vict. c. 83, s. 42, calling upon the defendants to show cause why they should not, within four days after service of the rule absolute to be made herein, deliver to the plaintiff's attorney an account in writing verified by affidavit, of all the metallic barometers called or known as Bourdon's, or Bourdon & Richards's metallic barometers, sold by the defendants since the 1st of October, 1851, and of the profits made therefrom; and why the defendants should not keep an account of all such barometers sold by them, and of the profits made therefrom, until such further order as this court may make in the premises; and why the plaintiff, his attorney and agent should not be at liberty to inspect the defendant's books containing any entry relating to any such sale. The plaintiff was the assignee of a patent for a new kind of barometer called "aneroid barometers," and had commenced an action against the defendants for an alleged infringement of such patent shortly before the application for the present rule. The substance of the affidavits in support of, and in opposition to the rule, will be found fully stated in the judgment.

June 13. *Willes* showed cause. The rule prays for a retrospective account from the date of the patent, and the requiring of such an account in equity is always accompanied by an injunction; and unless it is intended to introduce a new practice, not before known in equity, the rule cannot be made absolute.

[LORD CAMPBELL, C. J. In *Holland v. Fox*, 23 Law J. Rep. (N. S.) Q. B. 211; s. c. 25 Eng. Rep. 69, we thought the new statute was intended to give all the powers which a court of equity possessed.]

Here there is no application made for an injunction under section 42 of the Patent Law Amendment Act, and the present rule must be discussed upon general principles. It amounts to an attempt to find

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out by anticipation what is the amount to be paid, and that seems a solecism in legal procedure. It is, in effect, providing for the assessment of damages, before the decision of the question upon which the right to damages depends. As regards the future, the rule is still more objectionable, and such an application must have been unsuccessful in equity.

[ERLE, J. The application might be for an injunction, unless the defendants consented to keep an account.]

If an application for an injunction were made, the court might be satisfied by affidavits that there was no *prima facie* ground for an injunction. A court of equity would have no jurisdiction to order such an account, except upon a final decree, and ancillary to such a decree, or upon an undertaking by the defendant given for some good consideration, as the withdrawal of an injunction. *Hindmarch on Patents*, 305, 343, 361; *Crosley v. The Derby Gas Company*, 3 Myl. & Cr. 428. This latter case shows clearly that it is not any profit of the defendants that can be made a ground of recompense.

[LORD CAMPBELL, C. J. You need not trouble yourself on that point.]

In the event of a verdict for the defendants an order for a future account would be useless, and the defendants would have been put to trouble and expense without any consideration for it. Again, if the plaintiffs were successful, the account could not be made use of before the master. What is to repay the defendants for the trouble and expense which must be occasioned by keeping a proper account?

Grove, in support of the rule. The rule is as nearly as can be in accordance with the prayer of a bill in equity in patent cases. The proceeding under the statute must either be in analogy to proceedings in equity, or for the purpose of enabling the plaintiff to submit the account to the jury as part of his case upon the question of damages.

[LORD CAMPBELL, C. J. It would then be in the nature of a bill of discovery.]

Yes; and the right to inspect books which is given is in that nature. It is not contended that profits are to be taken as the measure of damages, but it is one of the matters to be submitted upon which to estimate the damages. It is more within the province of a jury than that of the master to decide upon the matter of damages.

[CROMPTON, J. The jury could only give you damages in respect of what happened before the trial.]

By analogy to courts of equity, it is admitted that the plaintiff is only entitled to that part of the rule which asks for an account to be taken. But if the court thinks the master is not to take account of what has been done after action, then the plaintiff should be entitled to inspection of books and to have a retrospective account to lay before the jury. He referred to *Jesus College v. Bloome*, 3 Atk. 262, and *Parrott v. Palmer*, 3 Myl. & K. 632.

Cur. adv. vult.

Vidi v. Smith.

The judgment of the court¹ was now delivered by —

LORD CAMPBELL, C. J. In this case, a rule was obtained soon after the commencement of the action, calling on the defendants to show cause why they should not within four days after service of the rule absolute to be made hereon deliver to the plaintiff's attorney an account in writing, verified by affidavit, of all the metallic barometers called or known as Bourdon's, or Bourdon & Richards's metallic barometers, sold by the defendants since the 1st of October, 1851, and of the profits made therefrom; and why the defendants should not keep an account of all such barometers sold by them, and of the profits made therefrom until such further order as this court may make in the premises; and why the plaintiff, his attorney or agent, should not be at liberty to inspect the defendants' books containing an entry relating to any such sales. The rule was drawn up on reading an affidavit, swearing that, on the 27th of April, 1844, a patent for a new mode of constructing barometers was granted to the inventor, who, on the 6th of November, 1849, assigned it to the plaintiff; that the defendants have sold barometers identical in principle with those manufactured by the plaintiff under the patent; that although the defendants have been warned against selling such pirated barometers, they sold one on the 1st of May last at their shop in London, and it is believed by the deponent that they have since sold many, and that they continue to exhibit one of these barometers in their shop-windows. The only affidavit in answer merely says, that the deponent is informed and believes that the question, whether the defendants' barometer is a piracy of the plaintiff's, was tried in a court of law in Paris, and decided against the plaintiff, and that this decision was affirmed on appeal by another court of law in Paris. We think that the greatest part of what is sought by this rule must be disallowed. Before final judgment, we ought not to grant any retrospective account, such an account would not aid any account of profits which may then be ordered if the plaintiff obtains a verdict, and such an account would not be ordered by a court of equity before the final decree. We are, likewise, of opinion that we ought not to make the desired order for an inspection of the defendants' books. The "inspection" mentioned in the 42d section of the 15 & 16 Vict. c. 83, we conceive, is an inspection of the instrument or machinery manufactured or used by the parties, with a view to evidence of infringement, and does not refer to an inspection of books, which is provided for by another act of parliament. But we think that we have authority now to order, and that we ought to order, the account to be kept by the defendants of all such barometers as they shall sell upon the principle alleged to be an infringement of the plaintiff's patent, and of the profits made therefrom, until such further order as this court may make, on condition of the plaintiff agreeing to waive all claim to recover more than nominal damages at the trial of the

¹ Lord CAMPBELL, C. J., COLERIDGE, J., ERLE, J., and CROMPTON, J.

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action, and on condition that, in case the verdict and judgment in the action shall be in favor of the defendants, the plaintiff undertakes to pay to the defendants the expense of keeping such account. It has been contended that, in the exercise of the equitable jurisdiction now conferred upon us, we can only grant an account where there is, or has been, an injunction. But an injunction does not invariably accompany an account in a court of equity; and if it did, in effecting the object in view by ordering an account, we cannot be governed by the same rules of procedure which it has been found expedient to adopt in courts of equity. With regard to an account to be kept during the litigation, we are to see whether there is laid before us reasonable evidence of a valid patent, of this patent having been infringed by the defendants, and of the defendants making profits by the infringement. The affidavit relied on by the plaintiff in this case is not strong, but being wholly unanswered by the defendants, we think that it is a sufficient foundation for this part of the rule. Such an account is often required by a court of equity on dissolving an injunction *ex parte* against the infraction of a patent, the plaintiff going to law to establish his legal right, and we think that we may grant it on such a *prima facie* case as is made out by the plaintiff in this case. But we are of opinion that it should only be granted on condition of the plaintiff waiving his claim to damages; for he ought not to be allowed to seek substantial damages and an account of profits conjointly. In actions for the infringement of patents, juries have found verdicts for large damages, which we have refused to disturb; but we conceive that if such actions had been brought while a bill in equity for an injunction had been retained, a court of equity would not decree an account of profits along with a perpetual injunction, much less would it entertain a bill praying for an account of profits filed after the verdict. We likewise think it expedient to require an undertaking, on the part of the plaintiff, to pay the expense of the account, should the verdict and judgment in the action be for the defendants; although, without this undertaking, the court may have power to order this expense to be paid by the plaintiff, as part of the costs of the action.

Rule accordingly.

WATTS and Wife v. PORTER.

June 12, 1854.

*Debtor and Creditor — Charging Order on Stock — Right as against
Prior Incumbrancer, without Notice.*

The 1 & 2 Vict. c. 110, s. 14, empowers a judge to order that stock, &c., standing in the name of a judgment debtor, or of any person in trust for him, shall stand charged with the payment of the judgment and interest, "and such order shall entitle the judgment

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creditor to all such remedies as he would have been entitled to, if such charge had been made in his favor by the judgment debtor" :—

Held, (by Lord CAMPBELL, C. J., WIGHTMAN, J., and CROMPTON, J.,) that the meaning of this clause is to give the judgment creditor the same right under the charging order, as against prior incumbrancers, as he would have under a valid and effectual charge made at the same moment by the debtor himself.

Therefore, where stock standing in the names of trustees, in trust for A, was charged by A as security for money lent to him by B, but no notice of this charge was given to the trustees, and subsequently C, a judgment creditor of A, obtained a charging order under the statute upon this stock, of which he gave express notice to the trustees, C.'s charge, created by the judge's order, took priority of that to B, whose title had never been perfected by notice to the trustees : —

Held, (by ERLE, J., *dissentiente*,) that the effect of the statute is only to give the judgment creditor with a charging order the same right as he would have under a lawful charge made by the debtor ; and therefore, under the circumstances, C was not entitled to the stock as against B.

ACTION against an attorney for negligence. The declaration alleged that the plaintiff Elizabeth, while sole, retained the defendant, as her solicitor, to invest 3,700*l.* at interest, on good security, but that the defendant wrongfully advanced the said money to one Theodore Williams, on bad security, whereby it became wholly lost to the plaintiffs.

Pleas, first, not guilty ; secondly, a denial of the retainer. Issue thereon.

At the trial, before Lord Campbell, C. J., at the sittings at Westminster, after Hilary term last, it was proved that the money had been paid by the female plaintiff, who was then sole, to the defendant as a solicitor, in the manner alleged, and a case of negligence was made out against him under the following circumstances : On the 10th of January, 1844, he advanced 2,000*l.* of the money to the Rev. Theodore Williams, on an agreement bearing date that day, and signed by Williams, purporting to be between him and the plaintiff Elizabeth, (then Elizabeth Davis,) which, (after reciting that Joseph Williams, by his will, having bequeathed certain annuities and made other bequests, had devised and bequeathed all the residue of his estate, real and personal, to trustees, for the benefit of his brother, the Rev. Theodore Williams, and that after his death, the trustees set apart the sum of 5,000*l.*, which was standing in their names in the books of the governor and company of the Bank of England, to provide for the payment of the annuities,) declared that the said sum of 5,000*l.* so standing in the name of the trustees, to which Theodore Williams would be entitled on the death of the annuitants, should be charged as a security for the said sum of 2,000*l.* and interest. Subsequently, by an undated memorandum written on this agreement, which Theodore Williams signed, he further charged all his interest under his brother's will, as residuary legatee, with the further sum of 1,700*l.* advanced to him on behalf of Elizabeth Davis. The defendant prepared the agreement and memorandum, but never gave any notice of the charge to the trustees, because, as he said, he considered it was only a temporary loan. On the 31st of May, 1847, James Garden and Alexander Urquhart, recovered a judgment, in the Court of Queen's Bench, against Theodore Williams, for 8,665*l.* ; and, on

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the 27th of May, 1848, at their instance, an order was granted by Wightman, J., under the 1 & 2 Vict. c. 110. s. 14, charging the 5,000*l.* standing in the names of the trustees with the judgment debt. This order was regularly entered on the books of the Bank of England, in which the stock stood, and express notice was given of the order to the trustees. The judgment remained wholly unsatisfied, and in 1853, Theodore Williams was discharged by the Insolvent Debtors Court, no part of the 3,700*l.* having been repaid, no interest having been paid upon it for some years, and there being no dividend for his creditors. The learned judge directed the jury, in estimating the damages, to consider that, as no notice had been given to the trustees of the charge in favor of Elizabeth Davis, the charge created by the judge's order in favor of the judgment creditors, of which notice had been given to the trustees, would have priority over it. The jury found a verdict for the plaintiffs, with 3,400*l.* damages. In the ensuing term, a rule for a new trial was obtained, on the ground that the judge had misdirected the jury in respect of the damages; against which,

Manisty and *Hannen* showed cause, and the rule was supported by *Bramwell* and *Willes*.¹

The arguments and the cases referred to, appear so fully from the judgments, that it is unnecessary to repeat them here.

Cur. adv. vult.

The Court being divided in opinion,

LORD CAMPBELL, C. J., now delivered the judgment of himself, Wightman, J., and Crompton, J. [After stating the pleadings and facts as above set out, his lordship proceeded.] After much deliberation, my brother Wightman, my brother Crompton, and myself, are of opinion that the rule should be discharged. Our decision turns upon the construction of the 14th section of the 1 & 2 Vict. c. 110, by which it is enacted, "that if any person against whom any judgment shall have been entered up in any of her Majesty's superior courts at Westminster, shall have any government stock, &c., standing in his own name in his own right, or in the name of any person in trust for him, it shall be lawful for a judge, on the application of any judgment creditor, to order that such stock, &c., shall stand charged with the payment of the amount for which judgment shall have been so recovered, and interest thereon, and such order shall entitle the judgment creditor to all such remedies as he would have been entitled to, if such charge had been made in his favor by the judgment debtor; provided that no proceedings shall be taken to have the benefit of such charge, until the expiration of six calendar

¹ May 3 and 11. Before Lord CAMPBELL, C. J., WIGHTMAN, J., ERLE, J., and CROMPTON, J.

months from the date of such order." By the order, the stock is to stand charged with the payment of the money recovered by the judgment, and it is to have the same effect as if such charge had been made in favor of the judgment creditor by the judgment debtor. If, at the time of the order, a charge had been given on the fund by the judgment debtor in favor of the judgment creditor, the judgment creditor having no notice of any previous charge, and he had given notice of his charge to the trustee, independently of the statute, it would have priority over the previous charge created in favor of Elizabeth Davis, of which no notice had been given to them. But, by the statute, the judge's order is to be a charge upon the stock, as if the charge had been given by an instrument which the debtor had himself signed, and the remedies upon it are the same. A charge so given by the debtor to a creditor, without notice of any previous charge, if notice of it be served upon the trustees, would certainly be preferred to a previous equitable charge of which the trustees had no notice. It is the notice only which establishes any privity between the trustees and the party in whose favor the charge is given; by such notice only, is the security completed; when it is given, the trustees become trustees for the party in whose favor it is given, and, till this charge is satisfied, they can apply no part of the fund to satisfy the demand of a party who had obtained a prior equitable charge of which they had subsequent notice.

The defendant contends that the statutable proceeding specified by section 14 of the act, is of the same nature as an execution, allowing the debtor's equitable interest to be taken to satisfy the judgment, and that it can only be taken subject to any prior equitable charge created, although that charge has not been perfected by notice to the trustees. But we think that this would be doing violence to the language of the legislature, which puts the judgment creditor who has obtained the charging order in the same situation as if he had, at that moment, obtained an instrument executed by the judgment debtor creating the charge. Having given notice of it to the trustees, and having had no notice of the former charge, he would, under these circumstances, before the statute 1 & 2 Vict. c. 110, passed, have been preferred to the prior incumbrancer. This doctrine which, without any express decision upon the subject, had long been recognized, was at last solemnly established in the two cases of *Deale v. Hall*, and *Loveridge v. Cooper*, 3 Russ. 1, which came on together before Sir Thomas Plumer, M. R. There, "a person having a beneficial interest in a sum of money invested in the names of trustees, assigned it for valuable consideration to A, but no notice of the assignment was given to the trustees; afterwards the same person sold his interest to B, who, without notice of any prior incumbrance, paid the purchase-money, completed the purchase, and gave notice to the trustees: held, that B, had a better equity than A, to the possession of the fund, and that the assignment to B, though posterior in date, was to be preferred to the assignment of A." The reason of the decision (which is equally applicable to the case at bar) is thus luminously expounded by the learned judge: "Where a contract

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respecting property in the hands of other persons who have a legal right to the possession, is made behind the back of those in whom the legal interest is thus vested, it is necessary, if the security is intended to attach on the thing itself, to lay hold of that thing in the manner in which its nature allows it to be laid hold of: that is, by giving notice of the contract to those in whom the legal interest is. By such notice, the legal holders are converted into trustees for the new purchaser, and are charged with responsibility towards him; and the *cestui que trust* is deprived of the power of carrying the same security repeatedly into the market, and of inducing third persons to advance money upon it under the erroneous belief that it continues to belong to him absolutely, free from incumbrance, and that the trustees are still trustees for him, and for no one else. That precaution is always taken by diligent purchasers and incumbrancers: if it is not taken, there is neglect, and it is fit that it should be understood that the solicitor who conducts the business of the party advancing the money, is responsible for that neglect. These inconveniences and mischiefs are the natural consequences of omitting to give notice to trustees; and they must be considered as foreseen by those who, in transactions of that kind, ought to give notice; for they are the consequences which, in the experience of mankind, usually follow such omissions. To give notice is a matter of no difficulty; and whenever persons treating for a *chose in action* do not give notice to the trustee or executor, who is the legal holder of the fund, they do not perfect their title; they do not do all that is necessary in order to make the thing belong to them in preference to all other persons." This decision was affirmed, upon appeal, by Lord Chancellor Lyndhurst, who entirely approved of the reasoning of the Master of the Rolls, and added, "In cases like the present, the act of giving the trustees notice, is, in a certain degree, taking possession of the fund; it is going as far towards equitable possession as it is possible to go: for, after notice given, the trustee of the fund becomes a trustee for the assignee who has given him notice."

Such being the rights of contending incumbrancers, independently of the statute 1 & 2 Vict. c. 110, when one of them is a judgment creditor, who has obtained a charging order under that statute, his rights must depend entirely on the construction of the statute; and this construction must be the same in a court of law and in a court of equity. Every tribunal administering justice, according to the statute, must consider only the effect intended by the legislature to be given to the charging order, and this is to be learnt from the language in which the meaning of the legislature is expressed. Without interpolating something not to be found in the 14th section, it gives in the most unequivocal terms the same remedies to the judgment creditor who has obtained the charging order as he would have been entitled to, "if such charge had been made in his favor by the judgment debtor." The defendant's counsel contended that we are bound to understand the word "honestly" to be implied, and that the charging order is only to have the effect which a charge of the debtor would have had if made honestly. To interpolate the word "honestly"

would, we think, be a qualification of the enactment wholly unauthorized. The words that are to be understood as implied by the legislature we think are "validly and effectually." The debtor could not validly and effectually make a charge to have priority over an antecedent equitable charge to which the incumbrancer has completed his title, and therefore the charging order has no such operation; but the first incumbrancer not having completed his title by notice to the trustees, the debtor might make a charge to a subsequent incumbrancer which in point of law would be valid and effectual. At the time of this charging order, the stock still continued to stand in the name of the trustees in trust for Theodore Williams. Till notice from Elizabeth Davis, they were not trustees for her; and immediately after notice of the charging order, they became trustees for the judgment creditor. At the expiration of six months, the judgment creditor might have proceeded against them in a court of equity. It is difficult to see how, after such a proceeding, Elizabeth Davis could have intervened or made her claim available. It is not contended that the trustees can be liable both to her and the judgment creditor.

Our construction of the statute throws no hardship whatever upon the person who obtains the first equitable charge: for if he uses due diligence, and gives immediate notice to the trustees, his title is complete and absolutely secure; and he has nothing to apprehend from a charging order afterwards obtained by a judgment creditor any more than from a subsequent equitable charge voluntarily created by the debtor: whereas, the contrary construction seems to have a tendency to encourage laches on the part of the first incumbrancer, and, by keeping the trustees in ignorance of charges created on the fund, to enable the *cestui que trust* to commit frauds upon subsequent incumbrancers. The first incumbrancer may suffer, as Elizabeth Davis does, by the negligence of a solicitor not giving notice to the trustees; but for this the law gives a remedy by action against the solicitor, in which damages are to be recovered commensurate to the loss sustained. The defendant's counsel mainly relied upon the great case of *Whitworth v. Gaugain*, 3 Hare, 416, s. c. 1 Ph. 728, which was decided by that very eminent judge, Vice-Chancellor Wigram, and was affirmed on appeal by Lord Chancellor Cottenham, and was approved of by Lord St. Leonards, when Lord Chancellor of Ireland. To the authority of that case we implicitly bow, and we entirely concur in the reasoning on which that decision proceeded. An equitable mortgagee of lands, who has completed his equitable title, is to be preferred to a creditor of the mortgagor, who, without notice of the equitable mortgage, has subsequently thereto recovered judgment against the mortgagor, and obtained actual possession of the lands by writ of *elegit*. There, certain bankers, in consideration of an existing debt, and of a further advance of money to a customer, obtained from him a deposit of the title-deeds of certain freehold and copyhold lands, of which he was seized, with a written memorandum signed by him, regularly charging the lands with payment of the whole debt and interest. Other creditors subsequently recovered judgments against

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him, and under the 13th section of 1 & 2 Vict. c. 110, sued-out *elegits*, under which the sheriff delivered to them the whole of the lands. The bankers having filed a bill in chancery, praying that they might be declared to have an equitable mortgage upon the lands, and to be entitled to priority over the *elegits* and judgments, they prevailed. But why? Because they would have been preferred to the judgment creditors, if at the time when the judgments were recovered "the persons against whom the judgments were recovered had by writing under their hands agreed to charge the lands with the amount of the judgment debts." The *elegits* were allowed to have the same operation and no more. But there was no laches on the part of the equitable mortgagees, and before the judgments were recovered their equitable title was perfect. Vice-Chancellor Wigram considered that the memorandum, coupled with the debts and the deposit of the title-deeds, "created as perfect an equitable charge as intention and act can possibly create;" that from that time the mortgagor became trustee for the mortgagees, and that under an execution against him on judgments subsequently obtained, the judgment creditors could not take for their own benefit that which was in truth the property of the *cestuis que trust*. Lord Cottenham, in affirming the decree, observed, that "by the equitable mortgage the plaintiffs acquired a special lien upon the property, and that they had as strong an interest as if a mortgage had been executed." Proceeding on the ground that the title of the equitable mortgagees was complete, he held, that they must have been preferred to the judgment creditors, independently of the statute, and that although under the statute the judgments operated as a charge upon all the lands, it must be taken as a charge subsequent to the charge before created by the equitable mortgage. Indeed, such effect is given to a perfected equitable mortgage, that in *Casbard v. The Attorney-General*, 6 Price, 411, it was allowed to prevail against an extent at the suit of the crown. But in the case at bar, on account of the gross negligence of the defendant, the equitable title of Elizabeth Davis had not been completed before the charging order and notice of it to the trustees. She has an equity as against Theodore Williams, the mortgagor; but, in competition with the judgment creditors, who have a charge upon the fund, and have perfected their title to it, hers is not an equal equity; she had acquired no right, legal or equitable, in the property, and, there being no privity between her and the trustees, she could only proceed against Theodore Williams, her debtor, *in personam*.

In our researches upon this important subject, we have found two recent cases, which were not cited at the bar, but which are well entitled to our deliberate consideration before we pronounce judgment. The first is *Bearcliffe v. Dorrington*, 4 De Gex & Sm. 122, before Vice-Chancellor Knight Bruce. A testator left real and personal property to trustees to be sold and divided among children. One of the children, by assignment, for valuable consideration, created charges on his portion, and notice of each of these assignments was, immediately after its execution, given to the trustees of the will. A judgment was recovered against the assignor. A sale was ordered

of the real estates, and the proceeds were invested in the 3l. per cents. The judgment creditor obtained a charging order under the 1 & 2 Vict. c. 110, s. 14, upon the share of the assignor. The question then arose, which should be preferred, the assignees or the judgment creditor? The vice-chancellor decided (we think most properly) in favor of the assignees. They had perfected their equitable security long before the charging order, and a new charge then created by the debtor could not have affected their securities. If the parties had equal equities, priority of date was to determine the preference between them. The case came exactly within the principle of *Whitworth v. Gaugain*. But the vice-chancellor is reported to have said *obiter*: "I doubt very much whether the judgment creditor is entitled to all the same rights as if he had been a purchaser by a particular contract for value. He is not in this situation. He claims under the 1 & 2 Vict. c. 110. I doubt whether this provision enables him to obtain more than his debtor had at the time fairly to dispose of. I do not, however, think it necessary to decide the point." Unfortunately the very learned judge does not at all state on what his doubts rested, or how he thought that this construction could be put upon the language of the statute. A still later case is *Dunster v. Lord Glengall*, Chanc. and Com. Law Rep. (Irish) 47, before the Master of the Rolls, in Ireland. His honor there decided, that an equitable mortgagee, by deposit of railway shares, is entitled to a priority over a prior judgment creditor, who, subsequently to the mortgage, has obtained an order charging the shares. We entirely concur in this decision; but we cannot concur in the reason given for it by the learned judge. On the 2d of May, 1848, Dunster recovered a judgment against Lord Glengall. In Easter term, 1849, Sargeant recovered a judgment against him, and Lord Glengall deposited with Sargeant, by way of collateral security, the certificates of twenty shares, which he held in the Waterford and Limerick Railway Company, and at the same time signed a memorandum by which he declared that the shares were deposited as an equitable mortgage, and that he charged the shares, with the sum due, on the judgment. On the 2d of June, 1851, an order was granted and served on the railway company, charging the shares, with the sum due, to Dunster on his judgment. It did not appear that Sargeant had given notice to the company of his security. Nevertheless, there seems no doubt that Sargeant was entitled to priority. No notice to the company was necessary to complete his security. Notice is only required when a charge is to be created by way of equitable mortgage on an equitable interest, and where there are trustees in whom the legal estate is vested. The shares belonged to Lord Glengall, and the company were not bound to attend to any equitable assignment he might make of them, or any incumbrance he might create upon them. Here, as in *Whitworth v. Gaugain*, the equitable security of Sargeant was complete by the deposit and the memorandum. It could not have been prejudiced by a subsequent charge created by Lord Glengall, of which notice was given to the company, and therefore it could not be prejudiced by the subsequent charging order. Nevertheless, his honor the Master

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of the Rolls is reported, in deciding in favor of Sargeant, to have considered the doubts of Lord Justice Knight Bruce as a deliberate opinion that "the judgment creditor who obtains a charging order, can obtain no more under it than his debtor had at the time fairly to dispose of," and to have rested his decree upon that opinion. After citing the passage from the judgment in *Bearcliffe v. Dorrington*, above mentioned, his honor proceeds as follows: "It appears to me, that the opinion thus expressed by Sir Knight Bruce is correct, and that Lord Glengall having, by the letter of the 2d of February, 1851, granted an equitable charge on the shares, his judgment creditor did not obtain by the charging order more than Lord Glengall had at the time fairly to dispose of. I shall, therefore, affirm the master's order."

According to this doctrine, we ought to decide in the present case in favor of the defendant; for when the judgment creditors obtained the charging order, Theodore Williams could only have fairly disposed of his interest in the stock standing in the names of the trustees, subject to the prior charge in favor of Elizabeth Davis, although he might have created effectually a valid charge in favor of a subsequent incumbrancer who gave notice to the trustees. But with the most sincere respect for those with whom we differ, we are bound to say, for the reasons we have given, that this doctrine does not appear to us to carry into effect the expressed intention of the legislature.

It must be borne in mind that when the remedy against the person of the debtor was greatly abridged, the object of the 1 & 2 Vict. c. 110, was not only to make the judgment attach on property not before bound by it, but also by means of an order to be obtained from the court or judge to give the creditor the advantage of an express charge, attended with peculiar incidents. Among these is a delay of one year before the creditor can seek to obtain the benefit of a charge created under section 13, and of six months before he can seek to obtain the benefit of a charge created under section 14. Therefore, the authorities collected in Bac. Abr. tit. "Mortgage," E, 3, to which we were referred, and the rules respecting what may be taken in execution under a judgment, and the respective rights of judgment creditors without any specific charge, and others with a specific charge on the property taken in execution, cannot govern us. It appears to us, that the legislature has placed the judgment creditor, who has obtained the charging order, exactly in the same situation as if the debtor had at that time signed an instrument giving him a charge upon the fund; and in the absence of any unfairness on the part of the judgment creditor, it is wholly immaterial to him whether the debtor, if he had created this charge, would have acted fairly or unfairly to other creditors.

We have only further to remark, that we put exactly the same construction on the 13th and 14th sections of the 1 & 2 Vict. c. 110, which are both framed on the same principle, so as, in extending the rights and remedies of judgment creditors, to protect all prior interests and charges which have not been left defective by the laches of those in whose favor they were created. For these reasons, we think that in this case the damages arising from the defendant's negligence, were

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properly estimated upon the supposition that the plaintiffs could have no claim to the fund in question, till the charge of the judgment creditors is satisfied, and that the verdict ought not to be disturbed.

ERLE, J. Upon this rule, the question raised was whether the order of a judge, charging stock standing in the name of a trustee in trust for the judgment debtor with a judgment debt, gave priority to the judgment debtor over a prior mortgagee of this stock, the mortgagee not having given notice to the trustee of his mortgage, and the judgment creditor not having notice of the mortgage, and the stock still remaining in the name of the trustee. The answer depends upon the 1 & 2 Vict. c. 110, s. 14, giving to the judgment creditor, with a charging order, all such remedies as he would have been entitled to if such charge had been made in his favor by the judgment debtor. For the affirmative it was contended, that if the creditor had received a charge from the debtor, and had given notice of it to the trustee without having notice of the mortgage, he would have had priority over the mortgagee, and that the giving of such notice was a remedy he would have been entitled to; therefore, a judgment creditor, with a charging order, is said to be entitled to the same remedy. For the negative, it was contended, that the remedies intended by the statute, were remedies against the debtor, which would make his interest in the stock available for payment of the debt, and which would arise upon a lawful charge made by him in favor of the creditor. The debtor's interest only is charged; for the condition in the statute for the charge is, that there should be stock standing in the name of a trustee in trust for the debtor. Now, if the debtor has already assigned the stock without notice to the trustee, it is not standing in trust for him, but in trust for the assignee, at least as between these parties. The assignee could, at any time, compel the trustee to transfer the stock to him, and neither the debtor nor the trustee could resist the claim of such assignee on the ground that he had given no notice to the trustee; and what is true of an assignment of the whole stock is true of a partial charge thereon. It is admitted that this would be the effect of the charging order upon stock standing in the debtor's name, and equitably mortgaged by him before the charging order. The equitable mortgagee would have priority, for the debtor would be trustee of the stock for him, and the stock would not be standing in his name on his own behalf. It is not probable that the legislature intended to give a greater effect to the order upon stock standing in the name of a trustee than it would have upon stock standing in the debtor's name.

Also, the charge intended by the statute must be taken to be a lawful charge, for it is not to be supposed that the legislature intended to force the debtor into the situation of a breaker of the law. Now, if the debtor made a lawful charge on stock, he would either specify his interest therein or charge it subject to outstanding incumbrances. The compulsory charge by a judgment creditor is analogous to a charge expressed to be on such interest as the debtor

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might have; and if worded in that way, the charge would give no right beyond what the debtor had, as a charge so worded seems to be notice to the creditor taking to inquire.

The second charge would not take priority over the first, unless the debtor charged as unincumbered that which was incumbered; if he did so, he would clearly violate the law, so far as to be liable to an action of tort for the damage arising from the false representation. If he asserted expressly that it was unincumbered, and obtained the advance by that falsehood, he would be indictable for a false pretence. The judgment creditor, therefore, would not be entitled to priority over the first mortgagee, if the charge intended in section 14 is a lawful charge.

Furthermore, the claim to take the stock from the first mortgagee is not a remedy against the debtor, for he has lost the stock in any event, but a remedy against the first mortgagee,—a remedy given upon the general principle for deciding which of two innocent claimants shall suffer by the fraud of a third party, namely, he who facilitated the fraud. Such is the doctrine of *Loveridge v. Cooper*. Now, a judgment creditor is in no analogy with a second mortgagee, who has been deceived into taking as unincumbered, a security that was incumbered. The judgment creditor has trusted to no particular security. He has rights which may be made to charge all the available assets of the debtor, and, among the rest, his stock; but he has advanced nothing on the stock, and has been in no way deceived in respect thereof, and the judgment debtor, by suffering judgment, has not used deception, nor been guilty of any fraud. The reason, therefore, for giving priority to a second mortgagee over the first, wholly fails in respect of a judgment creditor. The previous sections, making other assets available for execution, and creating a charge thereon by registering the judgment, are *in pari materia*, and closely analogous to the section in question. No reason can be assigned why a charge created on stock by the 14th section should be a charge to a greater extent or entitling to any other right under the name of remedy than the charge or interest in land created by the 13th section. By the 13th section, the registered judgment is to entitle to the same remedies as if the debtor having power to charge, had agreed to charge. There the charge is confined to the power which the debtor had, and does not extend to the possibility of interest which a fraudulent mortgagor may give rise to by granting a second mortgage without notice of the first; in which case no interest passes from the mortgagor.

The authorities support this view. In *Bearcliffe v. Dorrington*, Vice-Chancellor Knight Bruce expresses an opinion that section 13 enables the debtor to charge so much only as he could fairly dispose of. *Dunster v. Lord Glengall*, is a decision accordingly by the Master of the Rolls in Ireland. In *Johnson v. Holdsworth*, 1 Sim. N. S. 106; s. c. 1 Eng. Rep. 143, Vice-Chancellor Rolfe, speaking of section 13, says, "as well since the 1 & 2 Vict. c. 110, as before, a judgment is an equitable lien on what could be taken by *elegit*." In *Hawkins v. Gathercole*, 1 Sim. N. S. 63; s. c. 1 Eng. Rep. 135, the

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intention of the legislature in the 1 & 2 Vict. c. 110, is said to have been to create a charge on all property, which, by any process of execution, could be made available for the judgment creditor, which indicates the same limit. In *Whitworth v. Gaugain*, the judgment creditor is held not to have the right of a purchaser for value without notice, as against a prior equitable mortgagee. In *Terry v. Smith*, Hud. & Bro. 735, cited in Sugd. 302, it was held that the judgment creditor could not take a term by *elegit* against a prior mortgage thereof by an unregistered deed in a registered county. In *Langton v. Horton*, 1 Hare, 549, the distinction is taken that an equity, imperfect as between two mortgagees, may be perfect as between mortgagor and mortgagee; and if the judgment creditor has the right of the judgment debtor, an equity perfect against the debtor is perfect against the judgment creditor.

Upon this review, the arguments for the negative appear to me to preponderate; and upon the words of the statute, the authorities, and the reason for the law, I am of opinion that a judgment creditor with a charging order on stock does not become entitled to it against a prior mortgagee, although he has given no notice of his mortgage to the trustee of the stock. If that be so, the direction was wrong and the rule for a new trial should be absolute.

In accordance with the opinion of the majority of the court, the rule was discharged.

KERSHAW v. KERSHAW.

June 8, 1854.

Devise — Estate for Life.

A testator devised real property to A for life, and after his decease to the first son of the body of A for life, and after the decease of the last-mentioned first son of A, to the first son of the body of such last-mentioned son, with remainder to the second, third, and all other sons of the body of such last-mentioned son forever, the elder being always preferred to the younger; and in default of all such issue, the estate to go and descend to the testator's own right heirs forever. At the date of the will, A had two sons and two daughters living:—

Held, that A's first son took only an estate for life, with remainder in tail to his first and other sons, with an ultimate reversion to the right heirs of the testator.

EJECTMENT to recover a messuage and tenement called the "Halgh," situate in the township of Butterworth, in the parish of Rochdale, in the county of Lancaster.

At the trial, before Platt, B., at the Liverpool Spring Assizes, 1854, a special verdict was found, which stated that Jane Taylor, being seized in fee of the messuage and tenement in the writ mentioned, on the 28th of March, 1807, duly made and published her will, and

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thereby devised as follows: "I give, devise, and bequeathe unto my nephew, James Kershaw, of, &c., all my real estates called (*inter alia*) Halgh, in Butterworth, in the said parish of Rochdale, to hold to him, my said nephew James Kershaw, for his life, without impeachment of waste; and from and after his decease, I give and devise all the same estates unto the first son of the body of my said nephew James Kershaw, to hold the same to such first son for and during the term of his natural life only, without impeachment of waste; and from and after the decease of the last-mentioned first son of the said James Kershaw, I give and devise all the said estates to the first son of the body of such last-mentioned son, with remainder to the second, third, and all other sons of the body of such last-mentioned son forever, the elder being always preferred to the younger; and in default of all such issue as aforesaid, then I will that all the said estates shall go and descend to my own right heirs forever." The said lands or real estates, called Halgh, comprise the messuage and tenement in the writ mentioned. At the time of making the said will, the said James Kershaw therein mentioned was a nephew of the testatrix, Jane Taylor, and had at that time living four children, namely; Mary, Jane, James, and John, who were born in the said order, and had had another son, named James, who was baptized on or about the 23d of February, 1800, and was the eldest son, but died an infant several years before the making of the said will. The testatrix died, on the 3d of April, 1807, without having revoked her said will, and thereupon James Kershaw, the nephew, entered into the said messuage and tenement, and became seized of them for the estate to him devised. The said James Kershaw, the first-mentioned son of the said nephew James Kershaw, survived the testatrix, and on the 9th of November, 1825, intermarried with the defendant, Eliza Kershaw, by whom he had only five children, born in the following order, namely; two twins, born on the 14th of October, 1828, and who died in a few days, one of them being a boy and the other a girl, and neither of whom were baptized; a girl born on the 11th of April, 1830, and who died in a few weeks, but she was baptized, and named Sarah; a girl born on the 6th of January, 1835, who is now living, and named Elizabeth; a boy born on the 12th of February, 1840, who lived till he was between five and six years of age, and who was named James Henry, and who died on the 2d of June, 1845. The said James Kershaw, the nephew, died on the 12th of February, 1835, and thereupon the said James Kershaw, his son, who survived the testator, entered upon the said messuage and tenement, and became seized thereof for the estate devised to him. On the 6th of August, 1851, the said James Kershaw, the son of the said nephew who survived the testatrix, duly made and executed a deed under the "Act for the Abolition of Fines and Recoveries," which was duly enrolled in Chancery within six calendar months after its execution, whereby he attempted to convey and dispose of the said messuage, &c. to such uses, &c. as he should by any deed or deeds appoint, and in default of such appointment, and so far as the same should not extend, to the use of himself, his heirs and assigns. The jurors found, that if the said James Kershaw

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was seized of an estate tail in the said messuage, &c., the same would be conveyed according to the tenour and effect of the said deed. On the 21st of May, 1852, the said James Kershaw, the son of the said nephew who survived the testatrix, duly made and published his will containing (*inter alia*) the following clause, namely: "I also give and devise unto my said wife, Eliza Kershaw, the estate belonging to me, situate at Halgh, aforesaid," of which property the said messuage, &c. formed a part. The said Eliza Kershaw is the defendant. The said James Kershaw, the said son of the said nephew who survived the testatrix, died on the 4th of July, 1853, without having revoked or altered his said will. The plaintiff is the great-nephew and heir-at-law of the said Jane Taylor. But whether or not, &c.

Addison, for the plaintiff.¹ The intention of the testatrix clearly was to keep the estate in the male line of her nephew, James Kershaw; and, failing this, that it should revert to her heirs. The nephew plainly took an estate for life, and his first son also took only for life. The devise over is to the sons of the first son of the nephew severally and successively in tail, and this estate tail having failed, the plaintiff as heir-at-law of the testatrix is entitled. The word "forever," in the demise over, will either be rejected for uncertainty, or must be construed together with the following words as giving an estate in tail male. He referred to *Foster v. The Earl of Romney*, 11 East, 594; *Evans d. Brooke v. Astley*, 3 Burr. 1570; *Lewis d. Ormond v. Waters*, 6 East, 336; *Slater v. Dangerfield*, 15 Mee. & W. 263; and *Monypenny v. Dering*, 2 De Gex, M. & G. 145; s. c. 15 Eng. Rep. 551.

Cowling, contra. The effect of the devise is to give the nephew an estate for life and an estate in tail to his first son, who was to be the *stirps* of the inheritance. The words "sons of the body," in the following clause, must be read as a *nomen collectivum*, and as meaning heirs male of the body of the first son of the nephew. The clear intention of the testatrix would be defeated by giving the first son of the nephew only a life estate, and she evidently meant not to give an estate in tail general. He referred to *Robinson v. Robinson*, 1 Burr. 38; *Wright v. Leigh*, 15 Ves. 564; *Goodright v. Dunham*, 1 Dougl. 264; *Doe d. Blandford v. Applin*, 4 Term Rep. 82; and *Denn d. Webb v. Puckey*, 5 Term Rep. 299.

Addison replied.

Cur. adv. vult.

Judgment was now delivered by

LORD CAMPBELL, C. J. In this case, we are of opinion that the plaintiff is entitled to recover. The only question is, what estate was

¹ June 2, before Lord CAMPBELL, C. J., COLERIDGE, J., ERLE, J., and CROMF-TON, J.

Kershaw v. Kershaw.

taken under the will of Jane Taylor by James Kershaw, the son of James Kershaw the nephew of the testatrix. We think that he took only an estate for life. Such an estate is expressly limited to him by the words following the devise for life to the nephew: "And from and after his decease, I give and devise all the same estates unto the first son of the body of my said nephew, James Kershaw, to hold the same to such first son for and during the term of his natural life only, without impeachment of waste." Still, this estate for life might be enlarged into an estate tail, if there were any general intent expressed by the testatrix which, without doing so, could not be carried into effect. Her intent appears to have been that the sons of James the son should successively take estates tail, and that her right heirs should take only when these estates tail were exhausted. But this purpose will be carried into effect; James the son taking only an estate for life, and his eldest son taking an estate tail by purchase, without the estate of James the son, being enlarged so as to make him the *stirps* from whom his sons were to take by descent. The words which follow the limitation to him we consider quite sufficient to accomplish the intention of the testatrix: "And from and after the decease of such last-mentioned first son of the said James Kershaw, I give and devise all the said estates to the first son of the body of such last-mentioned son, with remainder to the second, third, and all other sons of the body of such last-mentioned son forever, the elder being always preferred to the younger; and in default of all such issue as aforesaid, then I will that all the said estates shall go and descend to my own right heirs forever." Bearing in mind that James, the son of the nephew, was born when the will was made, not only does the intention of the testatrix seem manifest, but she uses apt language to carry it into effect. After giving James the son an estate for his natural life only, without express words of inheritance in the limitation to his sons, it seems clear that, taking by purchase, they would take more than life estates, namely, estates tail successively. The several expressions "with remainder," "forever," and "in default of all such issue as aforesaid," we think are abundantly sufficient to indicate an intention to that effect. If the ultimate limitation in fee had been to a stranger, instead of being to the right heirs of the testatrix, it would have taken effect upon the death of James the son without issue, or upon the failure of the estates tail given to his sons; but this is quite compatible with James the son taking an estate for life only. It was contended that this construction of the will would defeat the intention of the testatrix by letting in females, as, if the sons of James the son take estates tail by purchase, they must be estates in tail general, whereas, it is said, she manifests a desire to exclude females from the succession. If such an intention be so clear, the estates tail taken by the sons may be construed to be estates in tail male. But we cannot discover any such manifest intention, nor do we see how it would be better carried into effect by giving an estate tail to James the son. This would be in direct violation of the language she has employed, and would entirely defeat the intention she manifests by her will, to keep the lands devised inalienable as

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long as she could in the line of the Kershaws, by exercising the power which she had to give an estate for life only to the son of her nephew. His disentailing deed and his will, therefore, operated nothing, and the plaintiff is entitled to recover as the heir-at-law of the testatrix. We do not consider it necessary to comment upon the cases cited in the argument, for none of them conflict with our decision, and they only lay down the well-known general rules by which we have been guided in giving

Judgment for the plaintiff.

HUGHES v. HUMPHREYS.

June 12, 1854.

Weights and Measures — Welsh "Hobbit" — Sale of Wheat by Weight — Validity of Contract.

A sale of wheat took place at a price per "hobbit." It appeared that the "hobbit" was a term used in Wales to express a quantity consisting of four pecks, each peck weighing forty-two pounds; and that the wheat in question had been delivered to the purchaser in sacks containing six pecks or 252 pounds, and the custom was so to deliver it, the sacks on such occasions being weighed, and the quantity in each sack increased or reduced to 252 pounds : —

Held, that this was to be considered a sale by weight and not by measure, and, therefore, not contrary to the provisions of 5 Geo. 4, c. 74, s. 15, and 5 & 6 Will. 4, c. 63, s. 6.

THIS was an action to recover the price of wheat sold and delivered by the plaintiff to the defendant.

The defendant pleaded, amongst other pleas, that the wheat had been sold by illegal measure, contrary to the provisions of 5 & 6 Will. 4, c. 63, s. 6, and the sale, therefore, was void.

On the trial, before Williams, J., at the last Spring Assizes for Flintshire, it appeared that, at the time of the bargaining for the sale of the wheat, the plaintiff, upon being asked the price, said he wanted 18s. per "hobbit," and that thereupon a contract was entered into for the sale to the defendant of 100 "hobbits" of the wheat at that price. The "hobbit," it appeared, was a term generally used in Wales to express a quantity made up of four Welsh pecks, of forty-two pounds each peck, and consequently the "hobbit" consisted of 168 pounds. Six pecks made a sack, and the custom upon the delivery of wheat was to deliver it to the purchaser in sacks; and upon delivery, the sacks were weighed, and if each sack contained more or less than six pecks, or 252 pounds, it was either increased or reduced to that weight. There was no such thing made as a distinct "hobbit" measure, and the wheat in question had been delivered according to the usual custom. A verdict was found for the defendant, leave being reserved to enter a verdict for the plaintiff if the court should be

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of opinion that the sale was not by an illegal measure contrary to the statute; and a rule *nisi* for that purpose was obtained in the following term, against which

Welsby and *Milward* showed cause. Before the 5 Geo. 4, c. 74, s. 15, it was illegal to sell by any other than Winchester measure, which contained eight gallons to the bushel. *The King v. Major*, 4 Term Rep. 750; and *The King v. Arnold*, 5 Ibid. 353. In *Tyson v. Thomas*, 6 M'Cle. & Y. 119, which was decided before that act, this very measure of a "hobbit" was held to be in contravention of the provisions of 22 Car. 2, c. 8, s. 2, and the facts in that case were almost identical with the present.

[LORD CAMPBELL, C. J. According to that case, the "hobbit" is a measure; here it denotes weight, and not the dimensions of the wheat; and the price of the wheat is regulated and ascertained by what it weighs, not what it measures.]

The evidence went only to the extent of what was done in this particular case, whether as matter of fairness or custom, did not appear. The statutes 5 Geo. 4, c. 74, and 5 & 6 Will. 4, c. 63, s. 6, were clearly intended to discontinue such local measures. If the wheat corresponded with the sample, the purchaser, though there had been an omission to weigh it, would have been bound, supposing the quantity had measured four pecks to each "hobbit." They referred also to *Owens v. Denton*, 1 Cr. M. & R. 713.

Brown and *Coxon*, in support of the rule, were not heard.

Per Curiam.¹ This was clearly a sale by weight and not by measure, the "hobbit" being a multiple of a pound. The seller is bound to deliver the number of pounds equal to the number of "hobbits" contracted for, or, in other words, so many 168 pounds. There was in this case, therefore, nothing done contrary to the statute to render the sale invalid, and the rule must be made absolute.

Rule absolute.²

¹ Lord CAMPBELL, C. J., COLERIDGE, J., ERLE, J., and CROMPTON, J.

² See *Jones v. Giles*, *post*.

Holland v. Fox.

HOLLAND v. FOX.

June 15, 1854.

Patent — Amendment Act, 15 & 16 Vict. c. 83, s. 42. — Account of Sales and Profits — Power of Court to order after Verdict.

The 42d section of the 15 & 16 Vict. c. 83, enables the court in which any action for the infringement of a patent is pending, "to make such order for an injunction, inspection, and account," as may to such court seem fit : —

Held, that this vests in the courts of common law the powers before exercised exclusively by courts of equity, and enables them to grant, either by interlocutory order, an account of all patent articles sold during the suit, or, after verdict for the plaintiff, and as part of the final judgment in the action, an account of all profits made by the defendant since the commencement of the action and after notice that an account would be required.

But the court has no power, where damages nominal or substantial have been recovered by the plaintiff, to order an account of profits made by the defendant prior to the commencement of the suit, the damages assessed by the jury being considered as the compensation for the loss of such profits.

THIS was an action for the infringement of a patent for improvements in the manufacture of umbrellas and parasols, in which a trial had taken place after Michaelmas term, 1853, and a verdict was returned for the plaintiff with nominal damages, no application being at that time made for an order for an injunction, inspection, or account under the 42d section of "The Patent Law Amendment Act, 1852," 15 & 16 Vict. c. 83. In the ensuing term, (Jan. 17, 1854,) final judgment not having been signed, a rule was made by the court under the statute, ordering the defendant, within ten days, to render an account of all umbrella and parasol frames made by the defendant, his workmen, &c., with ribs, &c., in imitation of the plaintiff's invention, showing in such account the number sold by the defendant, and to pay to the plaintiff all moneys received or agreed to be received, by reason of such manufacture and sale, and also the value of all frames which remained in stock and unsold.¹

On a later day in Hilary term, (Jan. 27,) a rule was obtained by the defendant calling upon the plaintiff to show cause why the above rule should not be discharged. This rule was obtained upon affidavits, stating that on the 6th of April, 1852, the defendant obtained a patent for improvements in umbrellas and parasols, which he was advised and believed was not an infringement of the plaintiff's patent, and continued to make and sell umbrellas, &c., according to his patent, until the 17th of December, 1853, which was the day after the verdict in this action was given, when he ceased to manufacture any frames, or other articles, according to his invention, and that,

¹ It was considered by the court that the most convenient course was to grant this rule absolute in the first instance, in order that the defendant might move to have it discharged, and thus give the plaintiff an opportunity of answering by affidavit any objections raised by the defendant.

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immediately after the verdict, he gave notice to all persons who had purchased umbrella frames which were in violation of the plaintiff's patent, of him, to discontinue selling them; that scarcely any profit was made by the defendant until within three months before the trial, when he made about 15% per cent. profit upon the value of the frames made by him; that the plaintiff did not before the verdict, ever give notice to the defendant that he would be required to furnish any account of articles made in violation of the plaintiff's patent, or of the profits derived by the manufacture of such articles. But it further appeared, that, in January, 1853, a letter was received by the defendant from the plaintiff's attorneys, complaining of an infringement of the plaintiff's patent, and proposing, for the avoidance of litigation, that the defendant should take a license, but stating that, in the event of that proposal not being accepted, an action would be commenced. The defendant not having accepted this proposal, the writ was issued on the 8th of February, 1853. There was also an affidavit made in opposition to the rule by the plaintiff's attorney, in which he stated that, in July, 1853, he told the defendant's attorney that, in the event of his obtaining a verdict for nominal damages, the plaintiff would be entitled to an account of all frames sold by the defendant, and would, if necessary, file a bill in equity for such account.

Sir A. Cockburn (Attorney-General) and Webster showed cause.¹ The account which it is sought to obtain, relates solely to a patent article sold before the trial, and, according to the former practice, if the damages recovered were merely nominal, a court of equity would have decreed an account of former sales. There is always a great difference made in equity between nominal and substantial damages. *Sainter v. Ferguson*, 1 Mac. & G. 286.

[LORD CAMPBELL, C. J. Is there any case where, there having been no previous notice to keep an account of sales, such an account has been decreed after a verdict and damages recovered?]

Upon referring to the books, it appears that the instances in which a patentee has recovered substantial damages do not exceed three, and wherever the damages are merely nominal, a bill for an account might be filed. *The Corporation of Carlisle v. Wilson*, 13 Ves. 256. In *Crossley v. Beverley*, 1 Russ. & M. 166, n., the case went on to an account, as appears from *Crossley v. The Derby Gas-light Company*, 3 Myl. & Cr. 428. *Bacon v. Jones*, 4 Ibid. 433, shows that, in the absence of special circumstances, a patentee ought to apply by interlocutory motion to have his legal title ascertained. *Baily v. Taylor*, 1 Russ. & M. 73, and *Smith v. The London and South-Western Railway Company*, 1 Kay, 408, show that if the right to an injunction is not made out, no other relief will be given; but according to *Story v. Lord Windsor*, 2 Atk. 630, there may be an account without an actual injunction. *Story's Equity Jurisprudence*, s. 33.

¹ May 10 and '25, before Lord CAMPBELL, C. J., COLERIDGE, J., ERLE, J., and CROMPTON, J.

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[LORD CAMPBELL, C. J. How far back may an account of bygone sales be decreed?]

According to *Crossley v. The Derby Gas-light Company*, it is limited to six years, and it will not be extended to any period during which the patentee has slept upon his rights. The 42d section of the 15 & 16 Vict. c. 83, is, however, not limited to what might have been previously done by a court of equity, but it gives a wide power in very large terms to make "such order for an injunction, inspection, or account as to such court or judge may seem fit." It will be said that the action is not now "pending," but that is not so, as no final judgment has been yet entered.

Hindmarch (Sir F. Thesiger was with him) in support of the rule. The jurisdiction hitherto exercised by courts of equity existed in two cases, either by ordering an account to be kept pending a suit for an injunction, or by directing the master to take an account of past transactions as part of the final decree; and when the proceedings at law were ancillary to the proceedings in equity, it was immaterial at what time the account was ordered; but the 42d section of the 15 & 16 Vict. c. 83, applies to a different state of things, where there is no proceeding in equity, and all the matters there mentioned, namely, "injunction, inspection, and account," are plainly interlocutory proceedings. The statute does not, therefore, extend to give this court power, except in the first of the two cases above mentioned.

[LORD CAMPBELL, C. J. Surely, it was intended to authorize an injunction after verdict.]

CROMPTON, J. If it be not so, the object of the act would be defeated by obliging the successful plaintiff to go to equity for an injunction to complete his remedy.]

The section does not carry out this object, because the injunction could not be granted until after judgment, when the action would cease to be pending here. But at all events, so far as relates to an account, the utmost which the act authorizes is an interlocutory account of sales, and such an order extending to subsequent sales only may be obtained immediately the writ is issued.

[COLERIDGE, J. How is the plaintiff to get the benefit of such an order after verdict?]

The judge has power to give any directions as to the account which he thinks fit, and he would therefore order payment to be made at the same time as the verdict, and the verdict ought to cover all prior damages sustained. Here, it must be assumed that it does so. This having passed *in rem judicatam*, cannot be said not to represent the real damage sustained by the plaintiff.

[COLERIDGE, J. The statute seems to assume that the account is not to be inquired into at the trial.]

It is submitted that the defendant has a right to the opinion of the jury on that question. Then, as to the authorities cited from equity, they do not bear out the plaintiff's view. *Crossley v. Beverley*, was a case of a fresh infringement after verdict, and, therefore, a totally different case from the present. In *The Corporation of Carlisle v.*

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Wilson, the account was one at common law. There is no instance of a court of equity having, after a verdict at law, entertained a bill for an account depending upon the same infringement as that upon which the verdict was founded. *Jesus College v. Bloome*, 3 Atk. 262, shows that if a bill for a final account did not contain a prayer for an injunction, it could not be sustained.

Cur. adv. vult.

Judgment was now delivered by

LORD CAMPBELL, C. J. We are of opinion that the rule of the 17th of January, 1854, ought not to be entirely set aside, but that it ought to be very materially modified. The plaintiff having brought an action for the infringement of a patent of invention, conducted it in the usual manner till trial, without any application to the court under the 15 & 16 Vict. c. 83, s. 42. At the trial, he recovered a verdict and damages, without any reference to that statute, as he would have done before the statute passed. He now prays for an account of all umbrellas, &c., ever made and sold by the defendant, containing any thing which is to be considered as an infraction of the plaintiff's patent, and that the defendant may be ordered to pay over to him all the moneys received for these umbrellas, &c., and the value of all such umbrellas, &c., which the defendant has made and which remain unsold. We conceive the meaning of the legislature in the enactment relied upon to have been, to vest in the courts of common law in which actions for the infringement of patent rights may be brought, the power to order an injunction, inspection, and account, heretofore exclusively exercised by courts of equity, so that suitors may be saved the vexatious delay and expense to which they had before been exposed in being obliged to go to a court of equity for an injunction, then being sent to law to establish their legal right by an action, and then being compelled to go back to equity for full redress. The court in which the action is commenced may now, by its own authority, do complete and final justice between the parties by this combination of judicial powers. But the plaintiff has altogether failed in showing that after a verdict with damages, large or minute, has been recovered in an action at law, a court of equity has subsequently entertained a bill at the suit of the same plaintiff against the same defendant without the allegation of any fresh infringement having been committed or threatened, and has ordered such an account as is now prayed, with such an order for the payment of money. The result of the proposed proceeding could be no just measure either of the loss sustained by the plaintiff by reason of the infraction or of the profits received by the defendant for which he might be considered a trustee for the plaintiff. The only accounts that a court of equity would grant, we conceive, would be, by interlocutory order, an account of the articles sold by the defendant during the suit, and, under certain circumstances, by the final decree, an account to be taken before the master of the profits made by the defendant from the sale of the pirated articles.

We do not think that the legislature has used any language which

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authorizes us to grant the rule prayed. All the loss which the plaintiff sustained prior to the commencement of the action, and all the loss for which damages could have been given to him by the jury, must be considered as compensated by the sum, however small, which they awarded to him, the verdict having been taken in the manner and under the circumstances stated. But it appears by the affidavits that, the action having been commenced in February, 1853, in January, 1853, there was a negotiation between the parties respecting the taking of a license. That, in July, notice was given to the defendant that the plaintiff would require an account of profit subsequently made by him from using the plaintiff's invention. That the defendant, by his own confession, did thus make large profits for three months before the trial, and for two days longer, till the 17th of December, when he ceased to manufacture umbrellas according to the plaintiff's patent. We think that we have authority to order, and that we ought to order an account of these profits. Objection is made that we have now no jurisdiction to order any account, the words of section 42, of the 15 & 16 Vict. c. 83, being, "it shall be lawful for the court in which such action is pending," and the defendant arguing that the action is no longer pending in this court. But we think that the action is pending till final judgment has been pronounced and entered up. Till final judgment, there cannot be any order for an account of profits, and any prior account ordered to be kept of sales, pending the action can only be ancillary to this account of profits, the interim account of sales becoming nugatory if there should be a verdict and judgment for the defendant. But in analogy to what is done in courts of equity, we are of opinion that an account of profits may then be ordered. A bill in equity praying for an injunction against the infringement of a patent, always contains a prayer that such an account may be decreed; and a court of equity, exercising a very wide discretion, by the decree directs or does not direct such account, and if it does, then from such time and in such form as the justice of the case seems to require.

Here the defendant having admitted that after being charged with the infringement of the plaintiff's patent, and after notice that he would be held liable to account for the profits, he did make large profits by continuing to infringe the plaintiff's patent; and as no part of such profits could have been awarded by way of damages to the plaintiff, we think that the defendant may be considered as trustee of these profits for the plaintiff, and, as a part of our final judgment, we order that the defendant render an account of these profits, and pay over the amount to the plaintiff.

The rule which the defendant now seeks to set aside will be moulded accordingly.

The rule was drawn up accordingly.

Dansey v. Richardson.

DANSEY v. RICHARDSON.

May 29, 1854.

Costs — Rule for New Trial when Court equally divided.

Where the court are equally divided in opinion upon a rule for a new trial, and it consequently drops, neither party is entitled to any costs of the rule.

In this case, a rule *nisi* for a new trial was obtained by the plaintiff, which was twice argued, in Easter and November terms last; but the court being equally divided in opinion, the rule dropped. 23 Law J. Rep. (N. S.) Q. B. 217; s. c. 25 Eng. Rep. 76. The defendant claimed to be entitled to the costs of the rule, which the master refused to allow. On the 10th of March, Maule, J., made an order directing the master to review his taxation. On the 8th of May, a rule *nisi* to set aside the order of Maule, J., was obtained, against which

Lush showed cause.¹ The rule for a new trial was in the nature of an appeal from the decision at *Nisi Prius*, and the defendant, having succeeded in retaining the verdict, ought to have the costs of that proceeding.

[Lord CAMPBELL, C. J. The rule upon appeals to the House of Lords is, that if the lords are equally divided, judgment is given for the respondent — *semper præsumitur pro negante*. But that principle does not apply to these courts. Here the rule drops, and neither party succeeds.]

The general practice of the masters has been to allow costs in such cases.

Pearson, in support of the rule, referred to *Chilton v. The London and Croydon Railway Company*, Trin. Term, 1848, Exch., not reported, where the court refused to rescind an order of Parke, B., directing the master to review his taxation and disallow the costs of a rule for a new trial under precisely similar circumstances.

[Lord CAMPBELL, C. J. We will consult the judges of the other courts, as this is a point of general practice.]

Cur. adv. vult.

LORD CAMPBELL, C. J., now said: We think that the rule to rescind the order of my brother Maule, should be made absolute. The court being equally divided upon the rule for a new trial, there was no decision come to, and no successful party; and, therefore, the costs of it ought not to be allowed to either party. The case cited by Mr. Pearson is directly in point.

Rule absolute.

¹ May 11, before Lord CAMPBELL, C. J., WIGHTMAN, J., ERLE, J., and CROMPTON, J.

Mayhew v. Suttle.

MAYHEW v. SUTTLE and another.

June 24, 1854.

Landlord and Tenant, Relation of — Master and Servant — Contract.

By an agreement, not under seal, made between the defendant, described as a common brewer, of the one part, and the plaintiff of the other part, reciting that the defendant was in possession of a messuage and premises whereon the sale of beer had been for some time past carried on by A. B. on the defendant's account, and that the plaintiff was desirous of carrying on such trade and business for the defendant, to which he had agreed, it was witnessed that the defendant agreed for the consideration there stated, that the plaintiff should enter upon the said premises and carry on thereon such trade or business for the defendant, in the place and stead, and in the same manner, and with and on the same privileges and terms, as the said A. B. had heretofore done, until the agreement should be determined by the notice thereafter mentioned. And the plaintiff thereby agreed during all the time he should carry on the said trade on the said premises for the defendant, that all beer sold by him on the said premises, should be had by him from the defendant; and that the plaintiff should not part with the said trade or the occupation of the said premises to any person without the license of the defendant: and that whenever either party should be desirous of putting an end to the agreement, the plaintiff should, on receiving from the defendant a month's notice, quit the said trade and deliver up possession of the said premises, and should be at liberty to leave the said trade and quit the occupation of the said premises, on giving one month's notice to the defendant: —

Held, that this did not create the relation of landlord and tenant between the parties, but that the occupation of the plaintiff was that of servant to the defendant.

ACTION for breaking and entering the dwelling-house of the plaintiff, situate at, &c., and used by him as a licensed house for the sale of beer.

Third plea, that, before the committing of the trespasses in the declaration mentioned, one Elizabeth Cabburn was seised in fee of the said dwelling-house, and demised the same to the defendant Suttle, to hold, from the 29th of September, 1849, for one year, and so on from year to year, so long as the said E. Cabburn and the defendant Suttle should respectively please; that the defendant Suttle entered upon the said dwelling-house, and became possessed thereof, according to the said demise, and afterwards ceased to have the actual possession thereof; and that, in order to regain possession of the said dwelling-house, (the said demise and tenancy thereby created being still subsisting,) the defendant Suttle and the other defendant as his servant, and by his command, broke and entered the dwelling-house as alleged in the declaration.

Replication. That the defendant Suttle ceased to have possession as in the plea mentioned, by reason of his giving up to the plaintiff, who then received for the said defendant possession, and entered into occupation of the said house, to hold the same according to the terms of a certain agreement theretofore made between the plaintiff and the said defendant Suttle, whereby the plaintiff was to enter on and occupy the same, and carry on the sale there of beer and porter of the said defendant, and no other; paying the defendant Suttle for the same, certain prices, exceeding the ordinary prices at which beer and porter are bought and sold, to be sold again by retail in houses for

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the sale of beer in Ipswich, until the expiration of one month, after a notice in writing from either party to the other of his intention to determine the same; and that the said endeavor to regain possession of the said premises was made after the plaintiff had entered, and while he was occupying, and before the expiration of his right to occupy the said house and premises under and according to the provisions of the said agreement.

Rejoinder. Setting out the agreement, which was as follows:—

“Memorandum of an agreement made this 21st day of September, 1852, between George Suttle, of Bury St. Edmunds, in the county of Suffolk, common brewer, of the one part, and Frank Mayhew, of Ipswich, dealer in the same county, of the other part. Whereas, the said George Suttle is in possession of a certain messuage and premises, situate at the corner of Falcon Street and Silent Street, in Ipswich aforesaid, whereon the sale of beer and porter hath been for some time last past, and is now carried on and conducted by George Utting, of Ipswich aforesaid, for and on the said George Suttle's account; and, whereas, the said Frank Mayhew is desirous of carrying on and conducting such trade and business for the said George Suttle, which he hath agreed to, upon and for the consideration hereinafter mentioned. Now, these presents witness, and the said George Suttle doth hereby, in consideration of a bondsman to be answerable for the amount of 50*l.* in default of payment by the said Frank Mayhew, that he, the said Frank Mayhew, shall and may from the date hereof, enter in and upon the said premises, and carry on and conduct thereon such trade or business for him, the said George Suttle, in the place and stead, in the same manner and with and upon the same privileges and terms as the said George Utting hath heretofore done, until this agreement shall be determined and put an end to by the notice hereinafter mentioned. And the said Frank Mayhew doth hereby agree, during all the time and term he shall carry on and conduct the said trade or business upon the said premises for the said George Suttle, that all beer and porter which shall or may be sold or consumed by him the said Frank Mayhew upon the said premises, shall be had and be taken by him of and from the said George Suttle; and, further, it is hereby mutually agreed between the said parties hereto, that the said Frank Mayhew shall not part with the said trade or business, or the occupation of the said premises to any person or persons whatsoever, without the license or consent of the said George Suttle first had and obtained for that purpose. And, also, that whenever either of the said parties hereto shall be desirous of determining and putting an end to this agreement, he, the said Frank Mayhew, shall and will, on receiving from the said George Suttle one month's previous notice in writing of such desire, without being paid or requiring to be paid any sum of money, or consideration of any kind whatsoever, then, or thereafter, by or from the said George Suttle, quit and deliver up to him, the said George Suttle, the trade or business, and the full, quiet, and peaceable possession of all and every, the said premises, together with all fixtures, goods,

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effects, and things belonging to him, the said George Suttle, as may be thereon; and, also, that he, the said Frank Mayhew, shall be at liberty to leave the said trade or business, and quit the occupation of the said premises on giving one month's notice in writing of such his desire, to the said George Suttle. As witness the hands of the said parties, the day and year first above written." [Signed by the parties.]

The rejoinder then averred that the defendant Suttle, and the other defendant as his servant and by his command, committed the trespasses, in the declaration mentioned, peaceably, the outer door of the said dwelling-house being open, for the purpose of determining the defendant's possession under the said agreement, and of taking possession of the said dwelling-house thereupon, for the benefit of the said George Suttle, and for no other purpose.

Surrejoinder. That, at the said time when, &c., the plaintiff had not received from, or given to, the defendant Suttle any such notice as in the rejoinder mentioned, whereby it had become lawful for the defendant Suttle to determine the plaintiff's possession under the said agreement, and to take possession of the said dwelling-house thereupon for the benefit of the said defendant Suttle.

Demurrer and joinder in demurrer.

Field, in support of the demurrer.¹ The agreement set out in the rejoinder, not being under seal, does not operate to pass any interest in the house to the plaintiff, but the whole vests in contract. *Bertie v. Beaumont*, 16 East, 33, is in point to show that the occupation is as servant, and not as tenant.

[WIGHTMAN, J. What effect do you give to the clause for quitting on notice?]

If the plaintiff were turned out without notice, it might be a ground for increasing the damages in an action for a breach of the contract, but that clause cannot operate to give an interest as tenant. Suppose the plaintiff were dismissed for improper conduct before the expiration of the month, he would not have a right to hold the premises. [He then argued that this was, if any thing, a tenancy at will, and that no notice was necessary; but this point became immaterial.]

Keane, contra. This is stated to be a licensed house for the sale of beer, and, therefore, the person obtaining the license must be the real resident owner or occupier; and it appears that the plaintiff holds as tenant under the defendant without paying any rent, upon the terms that he shall sell the defendant's beer at a certain price. If he were a mere servant of the defendant Suttle, it would be unnecessary to insert any covenant to take and sell his beer.

Field, in reply.

Cur. adv. vult.

¹ June 23, before WIGHTMAN, J., ERLE, J., and CROMPTON, J.

Mayhew v. Suttle.

On the following day judgment was delivered by—

WIGHTMAN, J. In this case the question arose whether, upon the agreement set out in the rejoinder, the plaintiff became tenant to the defendant. A further question was argued, which we do not think it necessary to pronounce any opinion upon, as to the nature of the tenancy, if any existed. Although the document in question is very inartificially drawn up, and some parts of it were properly pressed upon us as tending to show that the plaintiff had an occupation as tenant, we think, upon looking at the whole of the agreement, that the relation of landlord and tenant was never created, but that the occupation of the plaintiff was that of a servant merely.

It appears from the commencement of the document, that a person of the name of Utting had carried on, and conducted the sale of beer on the premises in question for and on the defendant's account, but it is stated that the premises were then in the possession of the defendant. Nothing could be stronger to show that the possession was then in the defendant, and that the occupation was by Utting, as his servant; in other words, that the occupation of the one as servant, was the possession of the other as master. In some of the cases, referred to in the argument, the courts held, that the circumstances showed the occupation of the servant to be merely as servant, and, therefore, the possession to be in the master; here, it is stated, in the commencement, and as the foundation of the argument, that the premises are in the possession of the defendant, Utting carrying on his business thereon. It is then stated that the plaintiff is desirous of carrying on and conducting such trade for the defendant; and it is then agreed the plaintiff shall enter upon the premises, and carry on and conduct thereon such business for the defendant in the place and stead, in the same manner, and with and upon the same privileges and terms as Utting had done, until the agreement should be determined and put an end to by notice. The plaintiff was to succeed Utting, and to be in the same relation to the defendant in which Utting had been. And we think that the pointing out what the relation was, and stating that the possession was in the defendant, exclude the supposition of the parties intending to create any tenancy. It was properly urged, in answer to this view of the case, that the stipulations that the plaintiff should take beer from no one else, and that he should not part with the trade or business or occupation of the premises, without the license in writing, are more consistent with an independent occupation by the plaintiff and with his carrying on the business on his own account; but they are not inconsistent with the business being that of the defendant, as expressly stated again and again in the agreement; and the defendant may well here claim to make it a part of the agreement that the plaintiff should not sell other parties' beer there, and should not give up the actual occupation, which, no doubt, he had, although that occupation was as servant, and, in law, the possession was the master's. So, also, the fact of the plaintiff having to pay the defendant for the beer as stated in the replication, is not inconsistent with the fact that

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the possession was really that of the defendant, as master. The beer is stated to be the defendants, and it is quite consistent with the defendant's case that the plaintiff might have had to pay higher prices than what beer is sold for to be sold again at retail. No doubt the prices were to be paid over to the defendant, and the stipulation that he should recover more for the sale on his premises than the wholesale price, seems as if he was to receive something as long as he was himself the retailer, on his premises, allowing the plaintiff, for his services, the rest of the excess of the retail over the wholesale price. At all events, we must take the sale, as stated in the agreement, to be for and on account of the defendant.

But it was said, that the plaintiff being empowered to enter and carry on the business until the determination, showed that a tenancy, at least for a month, existed. It is provided that when either party shall be desirous of determining and putting an end to, not the tenancy, but the agreement, the plaintiff shall, on receiving a month's notice, in writing, without being paid any sum of money, or consideration, quit and deliver up the trade and business, and full, quiet, and peaceable possession of the premises, with all such fixtures, goods, effects, and things belonging to the defendant, as may be thereon. And that the plaintiff shall be at liberty to leave the trade, and quit the occupation of the premises, on giving one month's previous notice. This provision seems applicable to, and, at all events, not inconsistent with, the relation of the parties, being that of employer and employed. The giving up the occupation, is treated as ancillary to, and connected with, the putting an end to the plaintiff's carrying on and conducting the trade. The notice may be given at any time, and not at the end of each month from the commencement, and it was only proper where the relation was not that of menial servant, and where, therefore, there might be some doubt, whether the employment might not be a yearly one, to engage that the relation of the parties might be put an end to by a month's notice. It was well remarked, that supposing there was misconduct on the part of the plaintiff, the defendant might have terminated the contract at once, and on such determination, the plaintiff's occupation could not have been intended to be allowed to subsist. It should be observed, that either party will have a remedy on the contract, if it be broken by the other determining the engagement without the notice, and without reasonable cause. We think, for these reasons, that the agreement in question did not create any tenancy, but that the occupation of the plaintiff was ancillary to the carrying on the trade for, and on account of, the defendant; and that the plaintiff, therefore, had no such possession as to enable him to maintain this action. Our judgment, therefore, upon this demurrer, is for the defendants.

Judgment for the defendants.

Badeley v. Vigurs.

BADELEY and another v. VIGURS, Executor, &c.

June 20, 1854.

Covenant — Non-repair — Merger of Part of Reversion — Surrender — Suspension of Right of Action — Apportionment of Covenant — 32 Hen. 8, c. 34.

A declaration in covenant stated that G., who was lessee of premises for a term of ninety-nine years, expiring on the 25th of December, 1849, during the term underleased to V. and S. for twenty-five years and a quarter, from the 25th of December, 1823; that, by this underlease, V. and S. jointly and severally covenanted with G., his heirs, executors, administrators and assigns, that they, their executors, administrators and assigns, would, during the term granted to them, repair the premises, and at the end of the term deliver them up in repair to G., his heirs, &c.; that V. and S. entered, and that, during the underlease, G. granted his reversion to S. (one of the under-lessees,) and the plaintiffs, whereupon the term in the underlease was, as to one undivided sixth part, merged in the reversion, and S. and the plaintiffs became, as joint-tenants, possessed of the reversion of three undivided sixth parts of the premises, and the plaintiffs became, as joint tenants, possessed of the reversion of two other undivided sixth parts of the premises; that V. afterwards assigned his interest in the underlease to S., and that thereupon the term granted by the underlease, as to one undivided sixth part, merged in the reversion in the three sixth parts whereof S. and the plaintiff were possessed, and the plaintiffs became, as joint tenants, possessed of the reversion of two of the last-mentioned three sixth parts; that S. died before the determination of the underlease; and alleged, as a breach, that, after S.'s death, V. had neglected to repair, and to leave the premises in repair.

The defendant paid money into court as to all the causes of action, except not leaving in repair at the end of the term; and as to such not leaving in repair at the end of the term, pleaded, that the premises were demised by L. for the term of ninety-nine years in the declaration mentioned to persons who assigned to G., with covenants to keep and leave in repair; that after G. had demised to V. and S., and before the assignment by S. to V., V. and S. by deed demised the premises to T. for twenty-three years from the 25th of June, 1825, with covenants by T. to keep and leave in repair. The plea then stated the death of T., and the devolution of his estate to M. E. T., his widow and executrix; and that L., the person then entitled to the reversion, after the deaths of S. and T., and during the continuance of all the terms, brought an action of covenant against the present plaintiffs for breaches in not repairing; that an agreement in writing for settling the action was made, on the 12th of July, 1844, between L., the plaintiffs, M. E. T., and the son of T., but without the privity or consent of V.; whereby M. E. T. agreed to pay L. 300*l.* and the costs of the action, and all rent up to the 24th of June then last, and the plaintiffs, as trustees of the property of G., agreed to pay L. 200*l.*; and M. E. T. agreed to deliver to the plaintiffs possession of the property; and the plaintiffs agreed to deliver up to F. (a depository,) the indenture of lease for the benefit of L., but to be produced from time to time for the purpose of supporting any claim by the plaintiffs upon V., or any other person, for the recovery of any rent due or to become due to the plaintiffs, or contribution, &c. in respect of any moneys to be paid by the plaintiffs under that agreement, in respect of the liability of the plaintiffs under the lease, or for any damages under any covenants contained in any underlease of the premises; and that when all such claims should have been satisfied, or in any manner put an end to, the said F. should deliver the lease to L., and also that M. E. T. should, at the request of L., or the person entitled to the reversion of the premises, execute a surrender of the lease; and the plaintiffs thereby agreed to concur in surrendering or assigning their interest in the said lease as L. or the person entitled to the reversion might require; and L. also agreed to accept the above sums, when paid, in full satisfaction of all claims, &c., whatsoever, under or by virtue of the said lease, for rent, dilapidations, or otherwise. The plea then stated, that the action was put an end to on the terms in the agreement specified; and that afterwards, in pursuance of the agreement, and at the instance and request, and with the privity, consent, and procurement of the plaintiffs, but without the privity or consent of V., and before the terms, or either of them, had expired by effluxion of time, the possession of the premises was given up by M. E. T. to L., who thereupon, without the privity or consent of V. entered into and kept possession thereof until, and at and after the expiration of that term by effluxion of time; and that by means of the premises, after the possession had been so

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given up, V. had been prevented from entering into the said premises and repairing the same, and from yielding up the same well repaired, and had been absolutely and necessarily hindered from keeping, and that it became impossible for him to keep, the covenant in that behalf as he might and would otherwise have done : —

Held, on demurrer to the plea, that the prevention mentioned in the plea was stated only as a conclusion of law from the facts before alleged.

That although V. might be unable to perform his covenant during the twenty-three years for which the underlease to T. had been granted, yet that he might have entered at the termination of that underlease for the residue of the term granted to him and S.; and that there was nothing, therefore, to prevent him from then repairing according to his covenant.

That the agreement, coupled with the giving up possession, could not, and was not intended by the parties to operate as a surrender of the interest of the plaintiffs to L.

Held, also, that the declaration was good, as the whole of the reversion which remained was vested in the plaintiffs alone, in respect of which they were entitled to sue on the covenant to repair.

That under the conveyance by G. to S. and the plaintiffs, one third of the reversion was at once destroyed by coalescing with half the interest under the lease which was in S.; and that, consequently, S. never took as reversioner; and there never was any suspension of the right of action by reason of S. being a party to sue and be sued.

That even if S. took and remained interested in one sixth of the reversion until that one sixth was destroyed by the assignment to him by V., still, the right of action for not leaving in repair, which arose only at the termination of the lease, never accrued to S., and therefore was never suspended; the doctrine of a right of action being gone by, suspension applying only to the case where there has once been a subsisting right of action, and not to a case where the objection is, that if it had accrued earlier, it could not have been enforced from the fact of the same person then being the party both to sue and be sued.

That the plaintiffs might recover on the privity of contract, transferred by the 32 Hen. 8, c. 34, although there were an apportionment of the covenant to repair; but that, in the present case, there was no such apportionment, as the plaintiffs had the whole existing reversion, and were injured if the whole of the premises were not kept in repair.

That the plaintiffs might recover on the privity of contract, transferred by the statute of Hen. 8, where the entire interest in the covenant had not passed to them.

COVENANT for non-repair of leasehold premises during the term, and for leaving them out of repair at the end of the term, contrary to the covenant in the lease under which they were held by the defendant's testator.

The following abstract of the pleadings is taken from the judgment delivered by the court. The declaration stated that Sir William Garrow held the premises in question under a lease for ninety-nine years, which expired on the 25th of December, 1849; that, during the time he so held the premises, he granted an underlease of them to the defendant's testator, John Vigurs, and one Leonard Smith for twenty-five years and a quarter, from the 25th of December, 1823. That by this underlease, Vigurs and Smith jointly and severally covenanted with Garrow, his heirs, executors, administrators, and assigns, that they, their executors, administrators, and assigns, would, during the term granted to them, repair the premises, and at the end of the term, deliver them up in repair to Garrow, his heirs, executors, administrators, or assigns. The declaration then stated that Vigurs and Smith entered upon the premises, and became possessed of them as joint tenants for the term granted to them, the reversion belonging to Garrow. It was then stated that, during the continuance of the underlease to Vigurs and Smith, Sir William

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Garrow granted his reversion in the premises to Smith (one of the under-lessees) and the plaintiffs; whereupon, the term in the underlease was, as to one undivided sixth part of the premises, merged in the reversion, and Smith and the plaintiffs became, as joint-tenants, possessed of the reversion of three undivided sixth parts of the premises, and the plaintiffs became as joint-tenants possessed of the reversion of two other undivided sixth parts of the premises. It was then alleged that Vigurs afterwards assigned all his interest in the underlease granted to him and Smith to Smith; and that thereupon the term granted by the underlease to Vigurs, and Smith, as to one undivided sixth part of the premises, merged in the reversion in the three sixth parts whereof Smith and the plaintiffs were possessed; and the plaintiffs then became as joint-tenants possessed of the reversion of two of the last-mentioned three sixth parts of the premises. The death of Smith before the determination of the underlease to Vigurs and him, and the non-performance by Vigurs of the covenant to repair after Smith's death, and to leave in repair, were then alleged.

The defendant, after pleading the payment of 1s. into court, as to all the causes of action, except the not leaving in repair at the end of the term, pleaded as to such not leaving in repair at the end of the term, that the premises were demised by John Llewellyn, and John Llewellyn the younger, for the term of ninety-nine years, in the declaration mentioned, to persons who assigned to Sir William Garrow, with covenants to keep and leave in repair; and that after Sir William Garrow had demised to Smith and Vigurs, and before the assignment to Smith by Vigurs, Vigurs and Smith, by deed, demised the same premises to George Tennant for twenty-three years, from the 25th of June, 1825, with covenants by Tennant to keep and leave in repair. The plea then stated the death of G. Tennant, and the devolution of his estate to Margaret Elizabeth Tennant, his widow and executrix; and that John D. Llewellyn, the person then entitled to the reversion after the death of Smith and Tennant, and during the continuance of all the terms, brought an action of covenant against the now plaintiffs Badeley and Lettsome, for breaches in not keeping the premises in repair. The plea then stated an agreement in writing for settling the action, made on the 12th of July, 1844, between Llewellyn, the reversioner, the plaintiffs, M. E. Tennant, the widow, and Henry Tennant, the son of the deceased G. Tennant, but without the privity or consent of Vigurs. By this agreement, which was set out *verbatim*, the Tennants agreed to pay Llewellyn 300*l.*, and the now plaintiffs, as trustees of the property of Sir William Garrow, agreed to pay Llewellyn 200*l.*; and the Tennants agreed to pay Llewellyn his costs of the action, and the Tennants agreed to pay all rent up to the 24th of June, then last past. The Tennants then agreed to deliver or cause to be delivered to the plaintiff within one week from that time, the possession of the property demised by the lease, and the now plaintiffs, Badeley and Lettsome, agreed to deliver up or cause to be delivered up to Mr. Frampton, of Gray's Inn, within fourteen days of that time, the said indenture of lease, in

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trust for the benefit of Llewellyn, but to be from time to time produced by Frampton, for the purpose of supporting any claim or claims to be made by the now plaintiffs, or either of them, upon Vigurs, or any other person or persons, for recovery of any rent, or arrears of rent, of or relating to the premises in question, due or to become due to the now plaintiffs, or contribution, reimbursement, indemnity, or compensation in respect of any moneys to be paid by the now plaintiffs, or either of them, under that agreement, in respect of the liabilities of the now plaintiffs under that lease, or for any damages under or by virtue of any covenants contained in any underlease or underleases of the said premises, or any part thereof; and that when all such claims should have been satisfied, or in any manner put an end to, the said Frampton should deliver the lease to Llewellyn; and, also, that the said Tennants, or one of them, should, at the request of Llewellyn, or the person entitled to the reversion of the premises, execute and procure to be executed by all proper parties, a good and valid legal surrender or assignment of the said lease; and the now plaintiffs thereby agreed to concur in surrendering or assigning their estate or interest in the said lease as Llewellyn or the person or persons entitled to the reversion might require, or counsel might advise. Llewellyn then agreed to accept the above sums, when paid, in full satisfaction of all claims and demands whatsoever, under or by virtue of the said lease, for dilapidations, rent, or otherwise howsoever. The plea then stated that the action was settled and put an end to on the terms in the agreement specified; and that afterwards, in pursuance of the agreement, and at the instance and request, and with the privity, consent, and procurement of the now plaintiffs, but without the privity or assent of Vigurs, and long before the terms, or either of them, had expired by effluxion of time, the possession of the premises was given up by M. E. Tennant, the executrix, to Llewellyn, who thereupon, without the privity or assent of Vigurs, entered into and took and kept possession of the premises until and at and after the expiration of the term of twenty-five years and a quarter (to Vigurs and Smith); and that Vigurs died before the expiration of that term by effluxion of time; and that, by means of the premises, after the possession had been so given up, Vigurs, during his lifetime, and the now defendant, as executor, since his death, have been prevented and hindered from entering into or upon the said premises, and repairing the same; and the defendant, as executor aforesaid, hath been necessarily, wholly, and absolutely hindered and prevented from yielding, surrendering, or giving up the same well or sufficiently repaired, &c.; and hath been and was absolutely and necessarily hindered and prevented from keeping, and it became and was impossible for him to keep the said covenant of the said J. Vigurs in that behalf, as he might and otherwise would have done. To this plea, there was a demurrer.

The case was twice argued,¹ first, on the 26th of April, 1853, by

¹ Before Lord CAMPBELL, C. J., WIGHTMAN, J., ERLE, J., and CROMPTON, J.

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Willes, for the plaintiffs, and

Hill, for the defendant; and again, on the 25th of April, 1854, by

Bramwell, for the plaintiffs, and

Hill, for the defendant.

The points argued, and the authorities cited, appear so fully from the judgment, that it is considered unnecessary to repeat them here.

Cur. adv. vult.

Judgment was now delivered by

WIGHTMAN, J. [After stating the pleadings as before set out, his lordship proceeded.] Upon the argument, it was contended, on the part of the defendant, that the plea was good, either as showing that he was prevented from keeping the covenant in question by the act of the plaintiffs, or on the ground that the agreement and delivering up the possession, operated as a surrender or assignment of the estate of the plaintiffs, so that they could not sue for a breach of the covenant accruing after their estate was so determined. As to the first of these points, it seems clear to us that the prevention mentioned at the close of the plea, is stated merely as a consequence of, and conclusion from, the facts stated before; and that there is no prevention by the plaintiffs stated to have occurred, except what is stated to have arisen "by means of the premises," and what is to be collected to have been occasioned by the facts stated in the plea. We must see, therefore, whether the facts stated do show that there was necessarily a prevention, as alleged, of the performance of the covenants by the defendant.

Now, although after the agreement of the 12th of July, 1844, and the delivering up of the possession by the tenants in pursuance of that agreement, Vigurs might not have been able to have entered to perform the covenant during the period of twenty-three years, for which the lease to Tennant had been granted, and it might possibly be said that the plaintiffs, who were parties to the arrangement, acted so as to prevent or join in preventing Vigurs from entering during that time, yet there was nothing to prevent Vigurs, or his representatives, entering at the termination of the lease to the Tennants. His reversion next succeeding on the determination of the Tennants' lease, would then have vested in possession; and he being no party to, nor privy to, the agreement or giving up of the premises, was not at all, and would not, in point of law, be prevented from entering into his reversionary estate; and then being possessed of the premises for the residue of the term granted by Sir William Garrow to him and Smith, there was nothing to prevent him from performing the covenant to leave in repair according to his covenant.

It was said, secondly, that the agreement, coupled with the giving up possession, showed that there was a surrender or assignment of

the interest of the plaintiffs to Llewellyn, the owner of the inheritance. Even supposing the intention of the parties to the agreement to have been that the legal interest of the plaintiffs should have entirely ceased, still, as they had only the reversionary interest after the expiration of the lease to Vigurs and Smith, who were no parties to the agreement, the giving up by them and the Tennants, the sub-lessees of Vigurs and Smith, could not operate as a surrender of the whole lease. The interest, if at all, must have passed by the assignment of the reversion to Llewellyn, the superior reversioner, so as to merge the plaintiffs' estate. But it is difficult to see how such a reversionary interest could pass without deed. We are of opinion, however, that it was not the intention of the parties to the agreement that the lease of the plaintiffs, or the plaintiffs' reversion upon that lease after the determination of the lease to Vigurs and Smith, should be put an end to. We think that lease to the plaintiffs was intended to be kept up, and that a future instrument of regular assignment or surrender by all the parties was contemplated. The proviso for the lease being kept in the hands of Frampton for use and for the recovery of rent and damages for breach of covenant, and the necessity for keeping up the lease to preserve the remedies of the plaintiffs on the underlease, and the agreement to concur in a future surrender or assignment, when all the interest should be got in at the request of Llewellyn or the person entitled to the reversion, and as Llewellyn, or the person entitled to the reversion, might require, all show that the parties neither intended to, nor did, put an end to the legal estate of the plaintiffs in the premises, but that that estate was designedly kept alive.

The plea, therefore, being, in our opinion, bad, it becomes necessary to consider the questions arising on the declaration. These are questions of great difficulty, involving technical points of an abstruse nature, as to which we have entertained, and still entertain, very considerable doubt. The plaintiffs claim against the representatives of one of the original covenantors, damages for breach of covenant in not leaving the premises in repair, and they claim in respect of their interest as assignees of all that remains of the reversion on that lease, either by one sixth of the lease and reversion having coalesced at the time of the grant of the reversion by Sir William Garrow to Smith and the plaintiffs, and another one sixth at the subsequent assignment of Vigurs' interest to Smith, as alleged in the declaration, according to Sir Ralph Bovey's case, 1 Vent. 193, or else by one third of the lease and reversion coalescing at the time of the grant of the reversion by Sir William Garrow, according to the version of Sir Ralph Bovey's case, in Vin. Abr. tit. "Merger," G. 16. It is clear that Smith was no longer at all interested in any reversion upon the lease. His interest in the lease coalescing with all his interest in the reversion, he became tenant in possession of a third of the land. And the reversion as to a third was entirely destroyed, whilst the plaintiffs remained reversioners of two thirds of the lease. It is important to observe, that they do not hold any reversion jointly or in common

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with any third party, but the whole that remains of the reversion, is in them alone.

The question then is, whether the privity of contract as to the covenant in question, is transferred to them by the statute of Henry the Eighth. It is said, on behalf of the plaintiffs, that they have all the reversion that now exists, and that, at the end of the lease, they were entitled to have the premises left in the state in which the lessees have covenanted to leave them, though being only interested in two thirds of the property, the damages would only be two thirds of the entire damages for not leaving in repair.

Several objections were made, on behalf of the defendant, to the title of the plaintiffs to sue. It was insisted, on the authority of *Foley v. Addenbrooke*, 4 Q. B. Rep. 197, and the cases there cited, that tenants in common must join in an action of this nature. To this objection, however, we think that it was well answered, as before remarked, that the interest of the plaintiffs was not in common with any other party, but that they were the assignees of all the reversion which existed. The difficulty, therefore, arising from the inconvenience of two or more actions, being brought by different tenants in common for the same breach of covenant, does not arise here.

It was said, also, that as Smith had some interest in the reversion after the grant by Sir W. Garrow to him and the plaintiffs, until the subsequent assignment by Vigurs to him, that he would be a party to be joined both as plaintiff and defendant in any action brought during that time in respect of any breach of covenant; and that, therefore, there was a suspension of all rights on the covenant; and that such suspension, once having taken place, destroys the remedy at law under the covenant forever. Two answers may be given to this objection: first, that on the original conveyance to Smith and the plaintiffs, the one third of the reversion was at once destroyed, Smith having then half the lease, and, consequently, more than sufficient interest in the lease to coalesce with the one third of the reversion, so that Smith never took as reversioner, but became at once tenant of the one third of the estate in possession, the reversion of the two thirds passing to the plaintiffs, according to Viner's report of Sir Ralph Bovey's case, which is, perhaps, the more intelligible view of that case. If this were so, Smith never could have been a party to sue in right of any reversion.

Supposing, however, as alleged in the declaration, that Smith took and remained interested in one sixth of the reversion, until that one sixth was destroyed by the subsequent assignment of Vigurs to him, the right of action, now under consideration, and which arose only at the termination of the lease, never accrued to him; and we are disposed to adopt the distinction, pointed out by Mr. Willes, as to the doctrine of a right of action once suspended being gone forever, being applicable only to the case where there has once been a subsisting right of action, which is suspended, and not being applicable to the case where the objection is, that, if such right of action had accrued earlier, it could not have been enforced, from the fact of the same party being one of the parties to recover and to be recovered

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against on the covenant. Here, assuming that the privity of contract passed sufficiently to the plaintiffs under the statute of Henry the Eighth, no cause of action, for the breach of covenant in question, could have vested in Smith.

It was urged further, on the part of the defendant, that the plaintiffs' alleged right of action being founded on the privity of contract, transferred by virtue of the statute of Henry the Eighth, there could be no apportionment, according to the authority of *Stevenson v. Lambard*, 2 East, 575. And it was also said, that a covenant to repair was in its nature an entire thing, resembling the case of an entire service by the rendering of a hawk, or the like, and that there could be no apportionment with regard to such entire thing. *Stevenson v. Lambard* does not appear to us at all to govern the present case. That was an action for rent after an eviction, and it was held, that an action of covenant would lie at the suit of the lessor against the assignee of the lessee, on the privity of estate, but that in an action of covenant on the privity of contract between lessor and lessee, the rent could not have been apportioned after the eviction by which the lessee had lost part of the land. *Twynam v. Pickard*, 2 B. & Ald. 105, is, however, an authority that this doctrine does not apply to a case like the present: for it was there held, that the assignee of the reversion of part of the premises might sue the lessee for not repairing that part. The objection of there being no apportionment, where the action depends on the privity of contract transferred by the statute of Henry the Eighth, would have been much more applicable than in the present case; as in that case the covenant to repair was in effect divided, and the lessee would be liable, to two distinct parties, to repair two distinct parts of the premises. Moreover, in the present case there is no apportionment. The whole reversion that remains is in the present plaintiffs, and the lessees, on their covenant, are bound to repair the whole premises, and the plaintiffs are injured if each portion of the premises is not kept in repair according to the covenant, though their interest being only in the reversion of two thirds of the original lease, their damage will be less by one third than if they represented the entire original reversion. *Twynam v. Pickard* shows, also, that the case of a covenant to repair is not like the case of an entire service, like that of the render of a hawk, mentioned in the old authorities cited before us on this part of the case; and that it is capable of division, if necessary to divide it, in reference to the reversion being divided, as to different parts of the land. As to the objection, also, of the service being entire, it must be remembered that here the thing to be done under the covenant, is not to be divided, no other persons than the plaintiffs having any interest in the covenant, and they having a right to the entire thing being done.

The remaining point to consider is, whether it is necessary to maintain an action on the privity of contract transferred by the statute of Henry the Eighth, that the entire interest in the covenant must have passed to the plaintiffs. *Twynam v. Pickard* is an authority to show that in the case of the assignment of all the reversion as

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to part of the lands, the assignee, though not having the whole interest in the covenant, may sue; and that case, therefore, shows, that it is not true, as a universal proposition, that an action cannot be maintained unless the whole interest in the covenant passes. The objection is, that the contract is entire and not capable of division, but the statute was construed in *Twynnam v. Pickard* to transfer the right of action as to part, and that in a case where the lessee might be subjected to two actions by different parties, for non-repair under the original covenant—a much stronger case than the present, where there can only be one action. The case of *Yates v. Cole*, 2 B. & B. 660; s. c. 5 Moore, 554, is a very strong authority in favor of the maintenance of the present action. That case very nearly resembles the present in some very important respects; it was an action by the lessors of some undivided parts of the reversion against the lessee for not repairing. It appeared on the plea that, after the demise, one Bonner, who was the tenant in common with the plaintiffs of the residue of the undivided shares, had assigned those shares to the defendant. In that case, like the present, so much of the lease as corresponded with the shares assigned to the defendant, would be merged in the reversion, and the defendant would be possessed of his undivided shares of the premises, whilst the plaintiffs remained the owners of the reversion of all that remained of the lease; so that, as in the present case, the whole original reversion was not in the plaintiffs, and the defendant himself, by the assignment of part to him, became tenant in common with the plaintiffs, though not, as observed before in reference to this case, tenant in common with the plaintiffs of any interest in the reversion. If the destruction of part of the estate in the lease by assignment to the lessee and the consequent merger destroys the covenant to repair, that would have been an answer to the action; and we must take the case as deciding that the covenant was not gone by the partial merger, and that the repair might be enforced by the remaining lessors in respect of their interest in the covenant. It may be remarked that *Yates v. Cole* does not seem to have been the subject of much discussion, and not being cited in the argument in the present case, we had not the advantage of having any comments on it at the bar. We think, however, that we ought to be guided by it as far as it goes; and as it establishes that the remaining lessors in such case may sue the lessee for repairs, (of course the damage being commensurate with their interest,) and as it seems from *Twynnam v. Pickard* that an interest less than the entire interest in a covenant to repair may pass by virtue of the statute of Henry the Eighth, we do not think that the objections to the plaintiffs' title in this case are made out to our satisfaction. It might often be most unjust that the partial merger of a lease, by part of the reversion coming to the lessee, should deprive the co-lessors of their remedy on the covenant to repair. On the declaration, the plaintiffs, as representing all that remains of the interest in the reversion, seem entitled to the benefit of the covenant: no other action can be brought by any other party; and as, for the reasons above given, we do not feel satisfied with the technical objections made, and the authorities we have cited seem in

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of June, 1852, and made between the said J. B. Blythe of the one part, and the said W. Westbrook, the plaintiff, of the other part, after reciting the above-stated mortgage of the 8th of May, 1852, the said J. B. Blythe, in consideration of 100*l.* advanced to him by the said W. Westbrook, covenanted that the said land, houses, and premises should stand charged with the further sum of 100*l.* and interest, in addition to the said sum of 700*l.* The last two deeds were both executed on the 19th of June, 1852, and registered in Middlesex on the 28th of June, 1852. The said sum of 700*l.* was advanced by the said W. Westbrook to the said J. B. Blythe prior to the said 8th of May, 1852, and the said sum of 100*l.* was paid to the said J. B. Blythe on the 19th of June, 1852. The defendant, Sarah Blythe, obtained a judgment in the Queen's Bench against the said J. B. Blythe for 867*l.* 2*s.* on the 5th of June, 1852, and on the same day the said judgment was registered in the Common Pleas office for registering judgments. The said judgment has never been registered in the Middlesex registry. On the 8th of September, 1852, an *elegit* was issued on the said judgment, and the same was executed and returned by the sheriff of Middlesex on the 20th day of the same month. The two sums of 700*l.* and 100*l.* remain due to the plaintiff W. Westbrook, on the security of the said two indentures of mortgage and further charge.

The question for the opinion of the court was, whether, upon the facts stated in the case, the plaintiff or defendant was entitled to the premises. If the court should be of opinion that the plaintiff was so entitled, then the judgment is to be entered for the plaintiff; but, if the court should be of opinion that the plaintiff was not so entitled, the judgment is to be entered for the defendant.

Butt, for the plaintiff.¹ The question is, whether a judgment which has been registered under the 1 & 2 Vict. c. 110, requires, also, to be registered under the 7 Ann. c. 20, s. 18, in order to entitle the judgment creditor to take by *elegit*, leasehold property in Middlesex. By that section, no judgment, except at the suit of the crown, is to bind any lands in Middlesex, except from the time of registering a memorial of such judgment in the registry office for Middlesex. Here the plaintiff's mortgage was duly registered under that act. By the 13th section of the 1 & 2 Vict. c. 110, a judgment is to operate as a charge upon all lands, &c., of the person against whom it is entered up, provided it is registered in the manner mentioned in section 19; but the effect of this is merely to give the judgment creditor a right in equity, and not any legal estate. Then the 2 & 3 Vict. c. 11, s. 5, enacts that, as against purchasers and mortgagees without notice, no such judgment "shall bind or affect any lands," &c., or any interest therein, further or otherwise, or more extensively in any respect, although duly registered, than a judgment of one of the superior courts aforesaid, would have bound such purchaser or mortgagee before the 1 & 2 Vict.

¹ November 11, 1853, before Lord CAMPBELL, C. J., COLERIDGE, J., and ERLE, J.

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c. 110, where it had been duly docketed according to the law then in force. Now, before the 1 & 2 Vict. c. 110, judgments, although docketed, did not affect leasehold property until execution lodged with the sheriff, and in register counties, no judgment affected any lands until registered. Neither this act nor the 2 & 3 Vict. c. 11, have repealed the 7 Ann. c. 20. Sugden's Concise View of Vendors and Purchasers, p. 392; *Johnson v. Holdsworth*, 1 Sim. N. S. 106; s. c. 1 Eng. Rep. 143. The result, therefore, is, that reading the statutes together, no judgment affects any lands in Middlesex, except from the registration of it in the Middlesex registry; nor can any judgment affect leaseholds anywhere until an *elegit* issues. Here, at the time the *elegit* issued, J. B. Blythe's interest in the lands in question, had passed from him to the plaintiff, who is, therefore, entitled to recover them as against the defendant.

Watson, contra. The effect of the 1 & 2 Vict. c. 110, ss. 11, 13, is to make the judgment binding upon all lands, &c., freehold or leasehold, to which the judgment debtor is entitled, either at law or in equity. Thus, a new right is given to the judgment creditor, who is to "have such and the same remedies in a court of equity against the hereditaments so charged by virtue of this act, or any part thereof, as he would be entitled to in case the person against whom such judgment shall have been so entered up, had power to charge the same hereditaments, and had, by writing under his hand, agreed to charge the same with the amount of such judgment debt and interest thereon"—section 13. And by section 11, an *elegit* may be sued out, and the whole of the lands taken under it, whether freehold or leasehold, to which the judgment debtor was legally or equitably entitled, at the time of entering up judgment. Therefore, the judgment may be enforced at law, and it is not, as supposed by the plaintiff, only a charge in equity on the lands. Here an *elegit* has been sued out, and the defendant is in possession under that writ.

[COLERIDGE, J. If the judgment creditor can take an equity of redemption by *elegit*, what security is the mortgage?]

It is no security where the mortgage is executed subsequent to the registering of the judgment, as here. Then the 2 & 3 Vict. c. 11, s. 5, has its object to do away with docketing judgments, and to substitute registration for it; but it makes no distinction between leaseholds and freeholds, nor does it exclude the former. Therefore, as a registered judgment now attaches upon leaseholds as well as freeholds, the effect of the 2 & 3 Vict. c. 11, s. 5, must be to give it the same operation on both kinds of property as a docketed judgment before had on freeholds. Any other construction would virtually repeal the 1 & 2 Vict. c. 11, ss. 11, 13, so far as leaseholds are concerned.

[LORD CAMPBELL, C. J. Still, the language of the 2 & 3 Vict. c. 11, s. 5, is very explicit.]

Butt, replied.

Cur. adv. vult.

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Judgment was now delivered by

LORD CAMPBELL, C. J. In this case, the plaintiff Westbrook claimed to be entitled to the lands in question, by virtue of a mortgage of two terms, for ninety-nine years respectively, made by John Blythe on the 19th of June, 1852, of lands in Middlesex, which mortgage was registered on the 28th of June, 1852. The defendant, Sarah Blythe, claimed to be entitled by virtue of a judgment against the said John Blythe, registered in the Common Pleas, on the 5th of June, 1852, and an *elegit* issued thereon on the 5th of September, 1852; and contended that the terms were made liable to execution by the 1 & 2 Vict. c. 110, s. 11, which makes it lawful for the sheriff, under an *elegit*, to take all such lands as the person against whom the execution issued was possessed of at the time of entering up judgment. This judgment was entered up on the 5th of June, 1852, and at that time, John Blythe was possessed of these terms; and terms are lands within this section. Therefore, this defence would prevail, unless there be an answer; and the plaintiff has two answers, both of which we consider valid.

First, he contends that, as he was a purchaser for value, without notice of the judgment, before the *elegit* issued, the registered judgment has no further effect on the land than that which a docketed judgment before the 1 & 2 Vict. c. 110, would have had, and for this he relies on the 2 & 3 Vict. c. 11, s. 5. Now, a docketed judgment before the 1 & 2 Vict. c. 110, did not bind leasehold lands until an *elegit* was awarded. See *Sir Gerrard Fleetwood's Case*, 8 Rep. 340; *Burdon v. Kennedy*, 3 Atk. 739; 3 Sugden's Vend. and Pur. 335, 336, 10th ed. Therefore, a registered judgment under the 1 & 2 Vict. c. 110, does not bind them against a purchaser for value without notice, until an *elegit* is awarded. The words of the 2 & 3 Vict. c. 11, s. 5, are not limited: "A registered judgment shall not bind or effect any lands or any interest therein, further or otherwise, or more extensively in any respect, than a former docketed judgment would have done." If leasehold lands, which were not before affected by a docketed judgment, were to be affected by a registered judgment, it seems to us that the express words of the statute would be contradicted. In 2 Sugden's Vend. and Pur. 401, 10th ed., it is said, "Leasehold estates are now bound in like manner as freeholds;" but that is said in reference to the 1 & 2 Vict. c. 110, s. 13, and not to 2 & 3 Vict. c. 11, s. 5. This answer applies equally to any claim of the defendant, on the ground of the judgment operating as a charge by the 1 & 2 Vict. c. 110, s. 13, the plaintiff having acquired the legal estate before the *elegit*.

For his second answer, he relies on the Middlesex Registration Act, 7 Ann. c. 20, s. 18, enacting that no judgment shall affect or bind any lands in Middlesex, but only from the time that a memorial of such judgment shall be entered at the register office; here the judgment was not entered at the register office for Middlesex. It is clear that such a leasehold as the plaintiff's, is comprised within the act, as the only leaseholds excepted are by section 17, and they are leases at rack-rent, and leases not exceeding twenty-one years, whereas the

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present lease is not a rack-rent, and does exceed twenty-one years. It was contended that the section requiring registration of a judgment in Middlesex, was in effect repealed by the 1 & 2 Vict. c. 110, s. 13, enacting that a judgment shall charge the land from the time of registration in the Common Pleas, as if a charge had been executed by the tenant. But, we think the two statutes can be read together, and carried into effect, by holding that a judgment registered in the Common Pleas will have the effect of a charge upon land in Middlesex only from the time that the judgment has been also registered in the registry for Middlesex. As we consider each of these answers to be sufficient to defeat the claim of the defendant, it is unnecessary to inquire further into the remedies upon the charge created by the judgment under the 1 & 2 Vict. c. 110, s. 13; and we give

Judgment for the plaintiff.

PLOWDEN v. CAMPBELL.

June 15, 1854.

Costs, Security for, by Plaintiff — Absence Abroad — Civil Service of East India Company.

A plaintiff resident abroad, and engaged in the civil service of the East India Company as a civil and sessions judge, is not exempt from the rule requiring plaintiffs to give security for costs.

THIS was an application for a rule calling upon the defendant to show cause why an order of Crompton, J., requiring the plaintiff to give security for costs in the action should not be rescinded.

The affidavit upon which the application was made stated that the plaintiff was a member of the civil service in the Bengal establishment of the East India Company, and was a civil and sessions judge at Ghazepore; that he was an English subject temporarily absent from England, and then residing at Ghazepore, engaged in the public service as such civil and sessions judge.

The cause of action had arisen in London, where both the plaintiff and the defendant were residing at the time.

Hawkins, in support of the application. This case falls within the exception to the general rule as to security for costs in favour of persons in the public service abroad. A private soldier abroad in the service of the East India Company was held exempt from the obligation to give security for costs. *Garwood v. Bradburn*, 9 Dowl. P. C. 1031; and the same exemption was held to apply to a commissioner of the Ionian Islands. *Nugent v. Harcourt*, 2 Ibid. 578. Here the plaintiff's residence abroad is in the discharge of a public duty, and he may at any time return to England.

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[CROMPTON, J. The exceptions to the rule have been only in the case of persons in the service of the crown, or the military service of the East India Company.]

The same reason and principle ought to extend the exception to the present case.

LORD CAMPBELL, C. J. The exemption from the rule has not yet been extended to any person in the civil service of the East India Company, and I am of opinion that the plaintiff in this case ought to give security for costs.

COLERIDGE, J., ERLE, J., and CROMPTON, J., concurred.

Rule refused.

Ex parte JOYCE and others.

May 29, 1854.

Church-warden, Election of — Rejection of Votes — Occupiers of Tenements — Mandamus.

In the parish of B. the owners and not the occupiers of tenements, the value of which did not exceed 6*l.*, were assessed to and paid the rates for the relief of the poor, under 13 & 14 Vict. c. 99. At the election of a church-warden for the parish, the votes of certain occupiers of tenements not exceeding the value of 6*l.* were rejected, on the ground that they were not entitled to vote, and one of the candidates was declared elected : —

Held, that as the election could not, on this ground, be considered as null and void, and it was not shown that the result of the election would have been different, an application for a *mandamus* could not be entertained.

THIS was an application for a rule *nisi*, for a *mandamus* to the vicar and church-wardens and overseers of the parish of Bourne, in the county of Lincoln, to convene a vestry, and elect a church-warden for the residue of the current year.

It appeared from the affidavits, that, pursuant to the 13 & 14 Vict. c. 99, the inhabitants of the said parish of Bourne, in vestry assembled, on the 12th of September, 1850, duly declared and ordered that owners of tenements in such parish, the yearly ratable value whereof should not exceed 6*l.*, should be rated and assessed to the rates for relief of the poor, in respect of such tenements instead of the occupiers thereof. On the 27th of March, 1854, an assessment was made for relief of the poor in the said parish as regards occupiers of tenements of the yearly value of above 6*l.*, as well as occupiers and owners of tenements, the yearly ratable value whereof did not exceed 6*l.*; and in that form the assessments had been made for three years and upwards, and the rates had been paid by the

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respective owners and landlords. The custom of the parish was, on Easter Monday, to elect two church-wardens, one of them being appointed by the vicar, and the other elected by the parish duly assembled in vestry for such purpose. On Easter Monday, the 17th of April last, a vestry was convened for such purpose, and B. W. Munton and R. Manby were duly proposed and seconded for the office of parish church-warden, and the show of hands was declared in favor of Munton. A poll was thereupon demanded, which took place on the next day. During the taking of the poll, votes were tendered for Manby, by persons whose names appeared in the said assessment, all of whom were occupiers of small tenements, the ratable value of which did not exceed 6*l.*, and the owners whereof had been assessed to the poor-rate in manner aforesaid; but the chairman rejected all such votes, and decided that the occupiers of tenements, the ratable value of which did not exceed 6*l.*, were not entitled to vote in the election of church-warden. The other candidate for the office was afterwards declared elected. The persons whose votes were rejected, were duly rated to the church-rates made for the parish, and had paid the same.

Lush, in support of the application. The question is, whether the occupiers of tenements, the landlords of which are assessed to the poor-rates, are or not entitled to vote in vestry, at the election of a church-warden for the parish of Bourne. Until the adoption of the statute 13 & 14 Vict. c. 99, every parishioner had a right to vote, and this act does not apply to the election of church-warden. Every inhabitant householder in the parish is liable to church-rates, and entitled to vote at such election; and all that was done at the election in question, was null and void, and a *mandamus* will lie. *The King v. The Rector of Birmingham*, 7 Ad. & E. 254.

[LORD CAMPBELL, C. J. In that case there was nothing like an election *de facto*. Here the only objection is, that certain persons were not allowed to vote, and if it prevailed in respect of a single rate-payer, the *mandamus* would go.

COLERIDGE, J. Is this not a matter of ecclesiastical law?]

The right to vote, is a temporal right, and the exclusion of persons entitled to vote, must have the effect of rendering the election void.

[CROMPTON, J. I do not apprehend that it would make the election void. If a return were made of every fact now before the court, how could we say that the election was wrong?]

As the office is not one of profit, no action will lie, and this is the only remedy open to the parties whose votes have been rejected.

[CROMPTON, J. Unless you show that a sufficient number of votes to turn the election have been rejected, there is no grievance upon which to ground the application for a *mandamus*.]

LORD CAMPBELL, C. J. We have nothing to do with the consideration of what course ought to be taken in this case, but I am clearly of opinion that this course cannot be taken. The application

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proceeds on the ground that the election is utterly void, and it would be monstrous to say that all the votes received at the vestry meeting, and all that was done, were null and void. The case of *The King v. The Rector of Birmingham*, proceeded on a ground that rendered the election clearly a nullity.

COLERIDGE, J. I am of the same opinion. Unless it were shown that the whole proceeding at the election was utterly void, the *mandamus* cannot go. It is quite consistent here, that if the persons rejected had been allowed to vote, the result of the election would have been the same.

ERLE, J., concurred.

CROMPTON, J. I am quite clearly of opinion that the rejection of the votes is no ground for a *mandamus*, unless it had been shown that the result of the election would have been different.

Rule refused.

REGINA v. ABNEY and another, Justices of Leicestershire. (THE CHURCH-WARDENS OF WHITWICK v. STINSON.)

May 31, 1854.

Church-Rate — Enlarging Burial-Ground — Single Rate for two Purposes.

Where the church-wardens of a parish made a single rate for providing necessary additional burial-ground for the parish, which could only be done, (if at all,) under the powers given by the Church Building Acts, and also, for draining and spouting a chapel in the parish, as at common law, it was —

Held, that the rate could not be enforced.

Quære, whether there is any power to make a rate for enlarging or for purchasing a burial-ground.

A RULE had been obtained, calling upon William Wootton Abney, Esq., and the Rev. John Manuel Echaleaz, two of the justices in and for the county of Leicester, and William Stinson, to show cause why the said two justices should not issue a warrant for distress and sale of the goods and chattels of the said William Stinson, to levy the sum of 14s. 9½d. assessed upon him by a church-rate granted for the parish of Whitwick, in the said county, on the 17th of December last, and the sum of 10s. for costs, adjudged by an order of the said two justices, made on the 12th of March last, to be paid by the said William Stinson to William Bannett, as one of the church-wardens of the said parish.

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This rule having come on for argument, the following special case was ordered to be stated between the church-wardens and Stinson, as parties.

Upon the 17th of December, 1852, a vestry meeting, for the parish of Whitwick, was held in the accustomed place, in pursuance of the following notice:—

“ This is to give notice that a vestry meeting of the rate-payers of the three townships of the parish of Whitwick will be held at the Infant School-room, on Friday, the 17th of December, at two o'clock, in the afternoon, to determine the best mode of providing additional burial-ground for the said parish, and to make a church-rate for that purpose, and also for the draining of St. George's Chapel yard, and for spouting St. George's Chapel, Whitwick. December 11, 1852.

(Signed)

“ WILLIAM BANNETT, *Church-warden*.

“ FRANCIS MEREWETHER, *Vicar*.”

The above notice was published as directed by the act, upon the door of the parish church, but was so for one Sunday only. At this meeting, a rate was granted by a majority of the rated inhabitants present.

The rate was laid as follows:—

“ We, the church-wardens and other parishioners of the parish of Whitwick, in the county of Leicester, whose names are hereafter subscribed, in pursuance of a resolution passed at the vestry meeting, duly holden, the 17th of December, 1852, for granting a rate of 4½*d.* in the pound, for and towards providing necessary additional burial-ground for the said parish, and for and towards the draining of St. George's Chapel yard, and for and towards spouting St. George's Chapel, in the said parish, rate and tax all and every the inhabitants and parishioners and other rate-payers of the parish aforesaid hereunder mentioned to the said rate in the sums hereafter mentioned.” Signed by the vicar, church-warden, and overseers.

The rate was duly allowed, and was, during the month of February, demanded of the defendant, William Stinson, and in consequence of his refusal, a summons was applied for and obtained, which came on for hearing before two justices, at Ashby-de-la-Zouch, on the 12th of March, 1853. The defendant, with his attorney, attended. The magistrates decided against the defendant, and ordered him to pay the rate. They, however, declined to issue a distress warrant, and the above rule was, therefore, obtained in this court, when the court ordered this case to be stated to try the validity of the rate.

The objections, raised to the validity of the rate, were: first, that there was no authority to levy a rate for providing additional burial-ground; secondly, that the notice ought to have been published on two Sundays, and that publication on one Sunday only was not sufficient; thirdly, that the rate was bad on the face of it, as being a

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rate under a special act of parliament, and a rate for common law purposes, for which different remedies and proceedings are provided; and that the two could not be mixed up together.

The two church-building acts, the 58 Geo. 3, c. 45, ss. 29, 60, and the 59 Geo. 3, c. 134, s. 24, were referred to.

The question for the opinion of the court was, whether the rate was good as against the objections stated above. If the court should be of opinion in the affirmative, then it was agreed that the rule should be made absolute, the rate paid, and all proceedings stayed. But if the court should be of opinion in the negative, then it was agreed that the rule should be discharged.

Merewether, in support of the rate. The first objection to this rate is, that a church-rate cannot be made at all to enlarge a burial-ground. Looking at the 58 Geo. 3, c. 45, and the 59 Geo. 3, c. 134, it is clear that power was meant to be given for this purpose. The second objection is, that notice of this rate should have been given for two Sundays. This is a misconception derived from the 59 Geo. 3, c. 134, s. 35, which applies to rates made under different circumstances and with different objects from the present rate. The third objection is, that rates under the church-building acts differ in their application from ordinary church-rates, and that this particular rate has been misapplied. There is nothing in this objection, and the present rate resembles every other church-rate.

Bovill, contra. The first point is, that a church-rate cannot be made for the purpose either of buying or of enlarging a burial-ground. The 58 Geo. 3, c. 45, has been relied on, but the general scheme of that statute shows, that it was intended to apply to edifices only, not to burial-grounds. Thus, the 59th section applies to the enlargement of churches and chapels, and provides that free seats shall be set aside in them, in consideration of the expenditure authorized. Again, section 61 applies to the building of churches and chapels. Then, as to the 59 Geo. 3, c. 134. The 24th section cannot be relied on in support of this rate: for that section modifies the section of the former act, (58 Geo. 3, c. 45,) which had reference not to the making of a rate, but to the application of it when made, and the 24th section itself, in like manner, regulates only the application of rates. The 25th section does give the power of making a rate, but only for churches and chapels, and burial-grounds are not mentioned as in section 24, where the application of ordinary church-rates to burial-grounds is authorized under certain formalities and precautions. These are the only sections applicable to the subject.

[*ERLE*, J. These statutes make frequent reference to burials. Is not the burial-ground included under the word "church," as used in them?]

The language of the sections referred to, is against making a rate to enlarge a burial-ground; the utmost effect of the 24th section is to authorize the application of a fund in hand to that purpose. The second objection is based on the 59 Geo. 3, c. 134, s. 25, which is the

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very section giving the power of making a rate. The third objection is supported by *The Queen v. Byrom*, 12 Q. B. Rep. 321.

Merewether, in reply. The case of *The Queen v. Byrom* is not in point, for the rate there was bad on the face of it. The only case at all in point is *Blunt v. Harwood*, 8 Ad. & E. 610.

[LORD CAMPBELL, C. J. Would not a rate for enlarging the churchyard, and one for spouting the St. George's Chapel, be differently accounted for, and belong to different funds?

CROMPTON, J. The forms of assent would differ for rates for the two purposes, which have been here combined in this single rate.]

There is no reason why the common-law rate and the statutory rate should not be combined. The church-warden takes the rate at his peril, and is unable to tell exactly, before the expenditure is made, how much may be wanted.

LORD CAMPBELL, C. J. I abstain from giving any opinion on the first objection. A notion has certainly prevailed, that a power did exist of making a rate for enlarging churchyards; but on that I give no opinion. The last objection is fatal to this rate. The rate for spouting the chapel is a rate at common law. The rate for enlarging the burial-ground is, at all events, justifiable only under the statutes referred to. The statutes prescribe a mode of laying and making rates under their provisions, which is different from the mode proper in a common-law rate. To lay a rate for both purposes in one and the same mode, is an erroneous proceeding; and this rate is consequently bad.

ERLE, J. This rate must be assumed to have been made under the statutory powers and with the statutory incidents which are applicable only to part of it; and consequently it is bad. I give no opinion on the first point. I will only observe that the 35 Edw. 1, c. 2, speaks of a churchyard as the "soil of a church." Therefore, where the statutes, referred to in this argument, speak of "existing churches," those words may include churchyards as well as the building itself.

CROMPTON, J., concurred.

Rule discharged, without costs.

Reed v. Ingham.

REED, *appellant*, INGHAM, *respondent*.

June 3, 7, 1854.

Watermen's Act, 7 & 8 Geo. 4, c. 75. — Steam-tug — Penalty for Navigating.

The 37th section of the Watermen's Act, (7 & 8 Geo. 4, c. 75,) imposes a penalty on any person, (other than a freeman of the Watermen's Company, or an apprentice to a freeman or widow of a freeman,) who shall work or navigate, "any wherry, lighter, or other craft," from or to any place or places, or ship, or vessel, within the limits of the act: —

Held, that this does not extend to a person who works a steam-tug for the purpose of towing vessels on the river.

THIS was an appeal against the following conviction made by the respondent, one of the magistrates of the Thames Police Court, under the Watermen's Act, 7 & 8 Geo. 4, c. 75, s. 37.

"Be it remembered that on, &c., J. J. Reed, of, &c., mariner, is convicted before me, the undersigned, &c., for that heretofore, and after the making and passing of 7 & 8 Geo. 4, c. 75, and at the time of the commission of the offence hereinafter mentioned, the said J. J. Reed had the working and management of a certain craft, to wit: a tug-boat, called The Newcastle, the same craft not then being a western barge, within the true intent and meaning of the said act of parliament, or any boat, barge, lighter, craft, or vessel excepted from the operation of the said act; and that the said J. J. Reed, not being a freeman of the Company of Watermen and Lightermen of the River Thames, or an apprentice to a freeman or to the widow of a freeman of the said company, or in any manner lawfully authorized to act as a waterman or lighterman, or to work or navigate the said craft, called The Newcastle, upon the said river within the limits of the said act, for hire and gain in manner hereinafter mentioned, on, &c., unlawfully and contrary to, and in violation of, the said act of parliament, for hire and gain, did, on the said River Thames, at the parish of All Saints, Poplar, in the county of Middlesex, within the said Metropolitan Police District, and within the limits of the said act, to wit: between Yantlett Creek, in the county of Kent, and New Windsor, in the county of Berks, in the said act mentioned, work and navigate the said craft, to wit, in moving and towing, and in aiding and assisting in moving and towing a certain large vessel from a certain place in the said river, there to and into the mouth of a certain dock, out of the said river, there called Green's Dock, within the limits and jurisdiction aforesaid, and then and there on the said River Thames, at the parish aforesaid, in the county aforesaid, within the limits and district aforesaid, unlawfully and contrary to, and in violation of, the said act of parliament, did act as a waterman and lighterman for hire and gain, to wit: in so moving and towing, and aiding and assisting in the moving and towing, of the said large vessel as

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aforesaid, and in proceeding thereto and returning therefrom on the said River Thames, within the limits aforesaid, in the said craft called *The Newcastle*; information and complaint of which said offence was made to me, the undersigned, by William Gillett, within thirty days after the committing thereof, (that is to say) on the 10th of November, in the year aforesaid; and I do adjudge the said James Joseph Reed for his said offence to forfeit and pay the sum of 1s. to be paid and applied according to law, and also to pay to the said William Gillett the sum of 2s. for his costs in this behalf; and if the said several sums be not forthwith paid, I order that the same be levied by distress and sale of the goods and chattels of the said J. J. Reed, and in default of sufficient distress, I adjudge the said J. J. Reed to be imprisoned in the House of Correction of the said county of Middlesex, in which said county the said J. J. Reed now is and appears before me, (that is to say) the House of Correction, Cold Bath Fields, within the said Metropolitan Police District, for the space of one hour, unless the said several sums of 1s. and 2s., and all costs and charges of the said distress, shall be sooner paid. Given under my hand and seal the day and year first above written, at the police court aforesaid.

J. T. INGHAM. (L. S.)"

Notice of appeal against the said conviction was duly given, and by consent of the parties, and under an order of Lord Campbell, C. J., the facts were stated for the opinion of this court, under the provisions of the 12 & 13 Vict. c. 45. s. 11, in the following case.

The Company of Watermen and Lightermen of the River Thames are incorporated under the said first-mentioned act of parliament, (7 & 8 Geo. 4, c. 75, local and personal, a copy whereof accompanies this case,) and they are now governed by the provisions of that act, and by certain by-laws made in pursuance thereof. (Such by-laws are to accompany this case, and may be referred to by the court or either party, or part thereof, if the court should think fit.) The 37th section of the act enacts: "That if any person, not being a freeman of the said company, or an apprentice to a freeman, or to the widow of a freeman of the said company, (except as hereinafter is mentioned,) shall at any time act as a waterman or lighterman, or ply or work or navigate, or caused to be worked or navigated, any wherry, lighter, or other craft upon the said river from, or to any place or places, or ship or vessel within the limits of this act, for hire or gain, (except as hereinafter is mentioned,) every such person shall forfeit and pay for every such offence any sum not exceeding 10*l*."

The conviction appealed against was made in respect of an alleged infraction by the appellant of the provisions of this section.

At the time of the commission of the said offence the appellant was master of the steam tug-boat called *The Newcastle*, and not a freeman of the Company of Watermen and Lightermen of the River Thames, or apprentice to a freeman, or to the widow of a freeman, or in any way authorized to act as a waterman or lighterman, or to ply, work, or navigate any wherry, lighter, or other craft, within the meaning of the said act within the limits mentioned in the said con-

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viction, for hire or gain. The said steam tug-boat was a vessel of the tonnage of 45 tons, exclusive of engine room and space for the boilers, and for storing coals; the entire burden or tonnage of the said steam-tug was 87½ tons, as per register; she was propelled by a steam-engine of fifty horse-power, and had been employed in towing all classes of sailing and other vessels, many of them of large burden. She was registered at the custom-house, under the provisions of the Register Act for Shipping, 8 & 9 Vict. c. 89. She was also licensed so long as such license was required as a sea-going steamer to go coastwise and to foreign ports, within the meaning of the 9 & 10 Vict. c. 100, and was subject to the provisions of that act. The said steam tug-boat had been employed in her ordinary business as well without and beyond as within the limits defined by the said Watermen's Act, that is to say, between Windsor and Yantlett Creek below Gravesend, in towing vessels to and from London, from and to Dover, and all intermediate ports and places. She had also been frequently engaged to take vessels up and down the English Channel and German Ocean, and to assist vessels in the channel, and to tow and accompany vessels to and from London and ports on the south and east coasts of England, and ports of the continent of Europe, and had, in fact, been employed as much outside as within the limits mentioned in the conviction. The steam-tug carries a small boat. On the occasion referred to in the said conviction the said steam-tug was employed at Blackwall, within the said limits, in towing and assisting a new steam vessel, or yacht, belonging to the Pacha of Egypt, into a dry dock, and the appellant was then master of the said steam tug-boat. There were not any goods or passengers on board either the said steam-tug or the said yacht at the time referred to in the said conviction, and the steam-tug was employed solely in towing and assisting the said yacht. The steam-tug did not carry goods or passengers. The said steam-tug belongs to a company called "The Shipowners Towing Company," who are proprietors of several vessels of the same class. The company has an office in London, at which orders are received for the tugs, and communicated thence to the masters of the vessels. Certain charges, according to scales for the tonnage of the vessels towed, and the distances for which they are towed, are made by the company, and without reference to the place at which the tug may happen to be at the time the order is received, or to which she may have to proceed after the job is completed, being contiguous or otherwise to the place where the ship to be towed may be at the commencement or termination of the job. The masters of the tugs also seek for jobs when at sea and in the river, and when engaged alongside would make the same charge, as if they had proceeded from a distance, to fulfil orders previously received; the pay in all cases, and in the particular instance referred to in the conviction, being calculated, according to the work performed when attached to the vessel towed, and not on any other consideration. The appellant was paid a salary by the owners of the said steam-tug, and was their servant. Steam vessels have been employed on the River Thames for the last thirty years and upwards, but

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were not used for the purposes of towing until twenty years ago, and a considerable time after the passing of the said Watermen's Act. At the time of the passing of the Watermen's Act and previously thereto watermen were employed (weather permitting) by the owners and masters of vessels to assist such vessels into dock, and such was an ordinary employment of watermen, and they are constantly so employed up to the present time, though not to the same extent, in wherries and small boats, as before the introduction of steam-tugs. The said steam-tug is within the provisions of the 59th section of the Pilot Act, 6 Geo. 4, c. 125. The master of the steam tug-boat being within a convenient distance of the yacht, a communication was made between the two vessels by means of a rope; and such communication having been made, the appellant, on the River Thames, within the limits aforesaid, for hire and gain, towed the said yacht in the manner mentioned in the conviction, but under such direction as is hereinafter mentioned. During such time, one Joseph John Waterson, a freeman of the Company of Watermen and Lightermen, and excepted from the operation of the 37th section of the before-recited act, was on board of and in command of the said yacht, for the purpose of superintending and directing the towing thereof into the said dock; for this service he was remunerated by the persons interested in the said yacht, and he was not responsible to or paid by the owners of the said steam tug-boat, or by the appellant. Whilst attached to the yacht, the appellant obeyed the instructions given by the said Joseph John Waterson, for the safe and proper towing of the said yacht, and this is the usual course in such case. The crew of the said steam tug-boat and the persons putting the machinery thereof in motion received their orders from the appellant, and were subject to his directions concerning the same, and not to the said Joseph John Waterson. The amount paid to the said Steam Towing Company for so towing the said yacht was the sum of 2*l.*, and nothing was paid to or claimed by them for or in respect of the said tug-boat's voyage to or from the said yacht. The appellant received no part of the amount paid in respect of the services rendered to the said yacht; his remuneration for so doing was included in his salary. The use of a steam tug-boat in the way and for the purposes before mentioned required skill and knowledge of the tides and eddies, shoals and landmarks of the said river, and the master must also be competent at sea. There are lighters and barges upon the River Thames, and navigating the same of as great a burden as 80 or 90 tons, and steamboats for carrying passengers, whose journeys commence and terminate within the limits of the act, of as great a burden as 150 or 200 tons.

The question for the opinion of the court was, whether the said conviction of the said James Joseph Reed, under the circumstances aforesaid, was authorized by the before-recited act. If the court should be opinion that it was so authorized, then it was agreed that such conviction shall be confirmed; if the court should be of the contrary opinion, then such conviction was to be quashed. And it was agreed between the said appellant and the said respondent, that

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a judgment in conformity with the decision of this court, and for such costs, if any, as this court should adjudge, might be entered by either party at the Court of General Quarter Sessions of the Peace, for the county of Middlesex next or next but one after such decision should have been given. And, it was agreed that the said Court of Queen's Bench should be at liberty to remit this special case to such person or persons as the said court should think fit, for amendment or alteration in any particular, and with such powers as to such court should seem meet.

Chambers, (*Ballantine* was with him,) in support of the conviction. The question is, whether the steam-tug, mentioned in this case, was "a craft," within the 7 & 8 Geo. 4, c. 75, s. 37. The word "craft" may include large vessels, such as this tug. — Webster's Dictionary; although, in Johnson's Dictionary, the word seems restricted to small vessels.

[COLERIDGE, J. Richardson's Dictionary confines the word "craft" to trading vessels.]

In the 37th section above referred to, the enumeration of vessels is, by way of ascending denomination, from "wherry" to "lighter;" consequently, the last word "craft," according to the usual rule of construction, must include larger vessels still. That it may include a steam vessel, is shown by the 57th section, where the word occurs, and has been so interpreted. *Tisdell v. Combe*, 7 Ad. & E., 788. It probably was meant to extend to vessels of any size, the principal object of the act being to provide that vessels of any size should be plied or worked for hire only by competent persons, duly qualified by apprenticeship. This restriction was not introduced merely to secure the safety of passengers, therefore it is no answer to this conviction that the tug in this case carried no passengers. The case finds that the work which the tug was doing, — assisting vessels into dock, — is work that used to be done by wherries, rowed by free watermen, which they were privileged to do, although they did not carry passengers any more than this tug. The employment of a steam-tug (for the motive power can make no difference) to do this work is, therefore, an infringement of the act. A further objection made to this conviction is, that the tug was not going from one "place" to another, within the 37th section. This objection assumes that "place" means a "plying place," but sections 43 and 46, show that the legislature, in using the word "place," meant something different from a "plying place." It cannot be, that unqualified persons were restricted only from going between the plying places fixed under the statute.

Thesiger, (*Milward* with him,) contra. The word "craft" in the 7 & 8 Geo. 4, c. 75, s. 37, is restrained, by the context, to things of a like nature with wherries and lighters, which are the preceding terms, and, therefore, the clause does not extend to a steam-tug, and the conviction is, consequently, bad. The title of the act, also, is "for the better regulation of the watermen and lightermen" of the River Thames. *Tisdell v. Combe*, was decided upon the 57th section of

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this act, which enables the mayor and aldermen to make by-laws, as to which section, 106 gives the most extensive powers; and the distinction was there drawn that section 57 is remedial, whereas, section 37, which is now in question, is penal, and, therefore, not to be extended beyond its strict construction. *Blanford v. Morrison*, 15 Q. B. Rep. 724; s. c. 19 Law J. Rep. (n. s.) Q. B. 533, shows how strictly a very similar act has been construed. This steam-tug was not "worked or navigated from or to any place or places, or ship or vessel," as mentioned in section 57, and it is, therefore, obviously not within the purview of that section, which applies solely to boats used for the conveyance of passengers or goods between different places or between ships. It is found that this steam-tug is within the 6 Geo. 4, c. 125, s. 59, (the Pilot Act.) If so, the master of it is expressly enabled to navigate it within the port of London. But the argument on the other side, would take away from him this privilege. It has been already decided that the master of a steam-tug does not stand in the relation of pilot to the ship tugged. *Beilby v. Scott*, 7 Mee. & W. 93; s. c. 10 Law J. Rep. (n. s.) Exch. 149. It is here found that the appellant obeyed the instructions of the master of the yacht. He did not act in any way as a waterman, but merely supplied the moving power.

Ballantine replied.

LORD CAMPBELL, C. J. We are called upon to put a construction on the word "craft," in section 37 of the 7 & 8 Geo. 4, c. 75. There is no doubt that it may have such a meaning there as will exclude a steam-tug. The question is, whether it is so used. The section involves serious consequences, and interferes with the existing rights of her Majesty's subjects. It imposes a penalty, and establishes a monopoly. For these reasons, it ought to be strictly construed. Now, can we suppose the legislature intended by it to prevent any person from using a steam-tug for the purpose here specified, other than a freeman of the Watermen's Company, and to impose a penalty for so doing? I think this cannot be so, and that the word "craft" must be looked at together with what precedes it, in order to ascertain its meaning. Now, it is preceded by the words "wherry, and lighter," and must, according to the ordinary rule of construction, be limited to craft *ejusdem generis* with them, which a steam-tug is not. Looking to the previous act relating to the Watermen's Company, 11 & 12 Will. 3, c. 21, the object seems to be to give them the sole right of carrying passengers or goods for hire, but not to extend their privilege to all sorts of vessels. If so, this steam-tug is not within the monopoly. I do not refer particularly to other sections of this act; but they all seem to lead to the same conclusion. Watermen were to be protected in doing all that properly belongs to them, but the act extends no further. *Tisdell v. Combe* was referred to in the argument. That case was properly decided, but it turned on a different section of the statute, having a very different object, namely, giving the Court of Aldermen the power of making by-laws for the

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"boats, vessels, and other craft to be rowed or worked within the limits of the act," and the word "craft" properly included things *ejusdem generis* with "vessels," which precedes it. There, the object was not to give a monopoly or impose a penalty, but to secure the safety of the queen's subjects. *Blandford v. Morris* is not in point; it was decided on a very different statute, and has no bearing on this case.

ERLE, J. I also am of opinion that the penalty has not been incurred within the meaning of section 37 of the 7 & 8 Geo. 4, c. 75; or, in other words, that the appellant has not "navigated or caused to be worked or navigated a wherry, lighter, or other craft upon the said river, from or to any place or places, or ship or vessel." He has navigated a steam-tug for the purpose of moving a vessel, and the question is, whether he comes within the meaning of the words which I have stated. The whole turns on the wide term "craft." No doubt this may include a steam-tug, but the ordinary rule of construction is, that, where a wide term follows a narrower term, it is confined to the same class as is so specified. According to that rule, "craft" should be here confined to something of the same kind as wherries and lighters. A "wherry" and a "lighter," are, in common parlance, boats plying for hire, and carrying passengers or goods; "other craft," therefore, will include other kinds of boats plying for hire, and carrying passengers or goods. A steam-tug is clearly different. The privilege is given to the Watermen's Company for the public good, on the ground that they have gone through a certain apprenticeship, and are presumed to know how to manage wherries, lighters, and such craft. There are other sections of the act bearing on this point, and showing what previous course is considered necessary to qualify a person to act as a waterman; and looking to these, I think a person perfectly qualified to ply with a wherry or lighter, might be wholly incompetent to take charge of a steam-tug for the purpose of towing large vessels. Such a vessel is, therefore, not within the purpose for which the privilege was given, and this being a penal clause, it must be construed strictly.

CROMPTON, J., concurred.

Judgment for the appellant.

Regina v. Sturge.

REGINA v. STURGE.

May 29, 1854.

Indictment — Variance — Amendment — Misdescription of Terminus of Highway.

An indictment for obstructing a highway, described it as a footway leading from A to B. It appeared in evidence, that the way in question passed from A to B through C, and that from A to C it was a carriage-way, and from C to B only a footway. The obstruction complained of was between C and B:—

Held, that this might be amended under the 14 & 15 Vict. c. 100, s. 1.

INDICTMENT for obstructing a highway, in the parish of Northfleet, in the county of Kent, which was described as “a common and ancient public footway, leading from and out of the turnpike road between Dartford, in the said county, and Gravesend, in the said county, towards, unto, over, and along a part of the shore of the River Thames, called the Hard, in the said parish of Northfleet, and over and along a certain other part of the said parish of Northfleet towards, unto, and into the town of Gravesend, in the said county.”

Plea — not guilty. Issue thereon.

The indictment, having been removed by *certiorari*, was tried, before Parke, B., at the last Spring Assizes for Kent, when it appeared that the highway in question, which led from the turnpike road between Dartford and Gravesend to Gravesend, passed for a portion of the way over a hill, called Orme House Hill. From the turnpike road to the top of this hill the highway was a carriage-way, but from thence to Gravesend it was only a footway, in which latter part the obstruction complained of occurred. It was objected, for the defendant, that this was a misdescription of the way, and *The King v. St. Weonards*, 6 Car. & P. 582, was cited. For the prosecution it was answered, that as a carriage-way includes a footway, there was no variance, but that if there were, it might be amended under the 14 & 15 Vict. c. 100, s. 1. The learned judge directed a verdict for the defendant, reserving leave to enter the verdict for the crown, if the court should consider that there was no variance, or that it might be amended, the jury having found for the crown upon the merits. A rule having been obtained to show cause why the verdict should not be entered for the crown pursuant to the leave reserved.

Bramwell and *Lush* now showed cause. The indictment by the word “footway” must mean a way for foot-passengers exclusively, as distinguished from a bridle or carriage way; therefore, this is a clear variance, and *The King v. St. Weonards* is directly in point, because one of its *termini* is erroneously stated. Then, as to the amendment, this is not “the name or description of any matter or thing whatsoever therein named or described,” which may be amended

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under the 14 & 15 Vict. c. 100, s. 1, because there the word "description" must refer to something given in lieu of a name; and the power does not extend to this, which is a misdirection in stating that to be a footway which in truth is not so.

Rose, contra, was not called upon to support the rule.

LORD CAMPBELL, C. J. The act is meant to apply to all cases where amendments may be made in furtherance of justice, and where the defendant cannot be prejudiced in his defence on the merits by such amendment. I think this is precisely the kind of case to which the act applies. The variance is quite beside the merits, and the defendant clearly cannot be prejudiced by the amendment.

Rule absolute.

ALLISON, *appellant*, v. THE CHURCH-WARDENS AND OVERSEERS OF THE TOWNSHIP OF MONKWEARMOUTH SHORE, *respondents*.

June 30, 1854.

Poor-Rate — Ratable Value — Brewery — Good-will of Public Houses — Annual Rent for Good-will.

A brewery and premises, together with the good-will and trade of certain public-houses, subjects to the rents theretofore received for the said public-houses, were leased for seven-teen years to A, yielding and paying for, and in respect of the brewery and premises, the clear yearly rent of 300*l.*, and for and in respect of the fixtures, implements, and utensils specified in a schedule, the further clear yearly rent of 50*l.*, and for and in respect of the good-will and trade of all and every, the public-houses, tenements, and premises mentioned in another schedule, the further clear yearly rent of 150*l.* A occupied the brewery and premises; and the public-houses, thirty-three in number, which were situate in different streets and places, and quite apart from the brewery, were let by A, to separate tenants, at rents about equal to the amount paid by A to his landlord. The tenants of the public-houses, as they were bound to do under an agreement, purchased from A, at the brewery, all the malt liquors, &c., consumed in their houses, and each tenant was separately rated to the poor-rate. Without the restriction as regards the purchase of malt liquors, &c., a higher rental would have been given for the public-houses: —

Held, (ERLE, J. differing in opinion,) first, that the 150*l.* paid for the good-will of the public-houses, was to be taken into account in estimating the ratable value of A's occupation of the brewery and premises. Secondly, that A, was not entitled to claim a deduction equal in amount, as an outgoing necessary to the obtaining, by the brewery, of the profit derived from the trade of the public-houses.

UPON an appeal against a poor-rate, dated the 16th of April, 1853, for the township of Monkwearmouth Shore, by which rate the applicant was assessed in respect of his occupation of a brewery and premises, at which he carried on the business of a brewer, as well as that of a wine and spirit merchant, it was agreed to state the follow-

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ing case for the opinion of the Court of Queen's Bench. In the rate appealed against, the appellant was assessed as follows:—

No.	Name of Occupier.	Name of Owner.	Description of Property rated.	Gross Estimated Rental.	Ratable Value.	Rate at 9d. in the Pound
55	James Allison.	Sir Hedworth Williamson.	Brewery, quay, malt-mill, houses, ale, and porter cellars, crane, storehouses, offices, wine, and spirit vaults.	£. 480	£. 375	£. s. d. 14 1 8

By an indenture of lease, dated the 21st of June, 1852, and made between Sir Hedworth Williamson, of the one part, and James Allison of the other part, Sir H. Williamson leased unto the said J. Allison the brewery and premises in question, together with the good-will and trade of certain public-houses mentioned in a schedule thereunder written, subject, nevertheless, to the payment of the rents theretofore received by the said Sir H. Williamson in respect of all and every such public-houses, to hold to the said J. Allison from the 13th of May, 1852, for seventeen years, with the following *reddendum*, "yielding and paying for the same yearly and every year during the term, unto the said Sir H. Williamson, his heirs, and assigns, the several clear yearly rents following, that is to say; for and in respect of the said brewery or brewhouse, malting-vaults, cellars, warehouse, stalls, offices, yards, and hereditaments, the clear yearly rent of 300*l.* of lawful British money; and for and in respect of the fixtures, implements, and utensils specified and set forth in the said first schedule hereunder written or hereunto annexed, the further clear yearly rent of 50*l.* of like lawful money; and for and in respect of the good-will and trade of all and every the public-houses, tenements, and premises mentioned, specified, and set forth in the said second schedule hereunder written or hereunto annexed, the further clear yearly rent of 150*l.* of like lawful money." Mr. Allison himself occupies the said brewery and malting-house, and the vaults, cellars, warehouses, stables, offices, and yard thereto appertaining. The thirty-three public-houses, the good-will and trade of which are demised and granted by the lease belonging to Sir H. Williamson, (except one which is in the adjoining township of Monkwearmouth,) are situated in the same township as the brewery, namely, in the township of Monkwearmouth Shore, but in different streets and places, and quite apart from the brewery. The said J. Allison hath continued to pay to the said Sir H. Williamson the rent theretofore received by Sir H. Williamson in respect of the said public-houses. The same public-houses, from the date of the said lease, have been, and still are, let on yearly or shorter tenancies, by Mr. Allison, in his own name, and occupied by separate tenants at rents amounting to about the same sum as Mr. Allison has paid as aforesaid to Sir H. Williamson.

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Every tenant of these thirty-three public-houses engages with Mr. Allison to purchase from him, at the said brewery and premises, and does accordingly purchase from him there all the malt liquors, wines, and spirits consumed in their houses. If free to take ale and spirits from any person the tenants chose, these houses would produce higher rentals. Each tenant is separately rated in respect of the public-house occupied by him, to the relief of the poor, in his own name. Sir H. Williamson might before the lease have attached the trade and custom of these houses to any other brewery, or left them as free houses, but in order to secure the exclusive dealing of the houses with this brewery, they were let as they are. Prior to and at the date of the lease, several of the occupiers of the same public-houses were under engagement to purchase all their beer, &c., from the occupier of the brewery. The appellant has several other public-houses, some in and some out of the respondent township, some of which houses belong to himself, and others he takes from their respective proprietors. These houses, some of which he had, at the date of the lease, from Sir H. Williamson, and others he has acquired since, he lets, or sublets, on the same terms as those belonging to Sir H. Williamson. It was argued, that the gross estimated rental or value of the said brewery and premises, independently of the said reserved rent of 150*l.*, but including the ratable fixtures, should be fixed and determined at the sum of 330*l.*, and in conjunction with the said reserved rent of 150*l.*, at the sum of 480*l.* It was further agreed, that if for the purpose of ascertaining the ratable value of the said brewery and premises, the said sum of 330*l.* was to be taken as the gross estimated rental, the corresponding ratable value was 275*l.*, and the amount of rate was to be reduced to the sum of 10*l.* 6*s.* 3*d.*; and if the said sum of 280*l.* were to be taken as the gross estimated rental, the rate in question was to be sustained, unless the court should think the appellant entitled to deduct 150*l.* as necessary to maintain the premises in a state to command such rent, in which case, also, the ratable value was to be reduced as above mentioned. It was also agreed, that the court should be at liberty to draw from the above facts any inference which might be drawn by the Court of Quarter Sessions or a jury.

The questions for the opinion of the court were: First, whether the 150*l.* so paid by the appellant was to be taken into account, or wholly excluded in estimating the net annual value of the brewery and premises occupied by him; secondly, whether, for the purpose of ascertaining such annual value, the 150*l.* so paid by the appellant was to be considered part of the gross estimated rental of the brewery and premises so occupied by him; thirdly, supposing the said 150*l.* was to be so considered, whether, in order to ascertain the ratable value, such sum should not be deducted from such gross estimated rental as an expense necessary to maintain the brewery and premises rated in a state to command such gross rent.

If the court should be of opinion that the sum of 150*l.* was to be wholly excluded from consideration in estimating the net annual value of the said brewery and premises, and that the sum of 150*l.* was not to be considered as any part of the gross rental, or, if so con-

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sidered, that such sum of 150*l.* should be deducted from the gross estimated rental as an expense necessary to maintain the premises in a state to command such rent, the rate to be reduced accordingly. And if the court should be of opinion that the said sum of 150*l.* should be taken into account in estimating the net annual value of the said brewery and premises, the rate in question was to be confirmed.

June 10. *Pashley*, (*Gray* with him,) argued on behalf of the appellant, and referred to *The King v. Bradford*, 4 M. & S. 317; *The Attorney-General v. Jones*, 1 Mac. & G. 574; *The King v. The Proprietors of the Liverpool Exchange*, 1 Ad. & E. 465; and *The Queen v. The North and South Shields Ferry Company*, 1 El. & B. 140; s. c. 16 Eng. Rep. 293.

Heath, for the respondents, referred to Bac. Abr. tit. "Rent," (B,) and (E,) 2 Bott, P. L. 194; *Tanfield v. Rogers*, Cro. Eliz. 340; *Salmon v. Matthews*, 8 Mee. & W. 827; *South v. Finch*, 3 Bing. N. C. 506; *The Newmarket Railway Company v. St. Andrew-the-Less, Cambridge*, 23 Law J. Rep. (N. S.) Q. B. 76; s. c. 25 Eng. Rep. 138; *The King v. Fox*, 1 Salk. 169; *The Queen v. Morrison*, 1 El. & B. 150; s. c. 16 Eng. Rep. 351; *Robinson v. Learoyd*, 7 Mee. & W. 48; *The King v. Welbank*, 4 M. & S. 222; *The Queen v. The Grand Junction Railway Company*, 4 Q. B. Rep. 18; *The King v. Parrot*, 5 Term Rep. 593, and 1 & 2 Vict. c. 56, s. 64. *Cur. adv. vult.*

LORD CAMPBELL, C. J. I am of opinion that the rate ought to be confirmed. In the first place, it seems to me that the principle on which this case should be decided is not in any degree affected by the Parochial Assessment Act, 6 & 7 Will. 4, c. 96. The rate is exclusively upon "Hereditaments," namely, "Brewery quay, maltmill house, ale and porter cellars, crane, storehouses, offices, and wine and spirit vaults," and the question is, what is the just estimate of the net value of the hereditaments so rated? The criterion is "the rent at which the same might reasonably be expected to let from year to year," with proper deductions. But in calculating this rent, regard must be had to the pecuniary value of all the advantages which the tenant will have as tenant and occupier of the demised premises connected with his occupation. In this case, I consider it a fact that the tenant and occupier of the demised premises in which he is to carry on the trade of a brewer is entitled to have and must have, during the term, the entire custom of thirty-three public-houses, that is, that the publicans carrying on business in the public-houses are bound to buy from his brewery the whole of the beer, &c., which is to be consumed by their customers. They are bound to deal at his brewery, and it is only by occupying the demised premises that he is entitled to this advantage. This advantage is worth 150*l.* a year. Such being the fact, what is the legal consequence? I think that the advantage so to be derived from the occupation of the premises is to be taken into consideration in estimating the assessable value, because it would be taken into

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consideration by a tenant in determining the rent which he would be willing to pay. I agree that influence in recommending customers is not ratable, and that profits in trade cannot be rated as an hereditament; nevertheless, I think that hereditaments are ratable according to the advantages which will be enjoyed from the occupation of them during the period for which the rate is to be imposed. It is admitted that the occupier of a soke mill would be liable to be rated higher than if there were no one under an obligation to grind corn at his mill and to pay him multure. But it is said, this is because the law compels customers to deal with him. In my opinion, it depends upon the obligation alone, and not upon the origin of the obligation.

If the owner of a large estate, with a grist mill upon it, were to insert in all his leases a covenant, that his tenants shall grind at his mill all the corn grown on their farms, and should let the mill with this certainty of custom, in my opinion the miller would be ratable as if the mill were a soke mill, because his profits would be as great and as certain; they would arise equally from the occupation of the mill; and the rent, which he would be willing to offer, would not be in the slightest degree influenced by the consideration that the obligation to deal with him arose from contract, instead of arising from immemorial usage. If there be a strong probability of custom coming to a house in which a particular trade is carried on, from the local situation of the house, this would be taken into consideration by the tenant in calculating the rent he would give; and the rent which he agrees to give upon this probability, would be the basis of the assessment upon him. If the additional rent, in respect of probable custom, is to be taken into consideration, I do not understand how the rent is to be excluded, which is given in consideration of the custom, which must certainly come to him as occupier of the premises assessed. Here there is a joint demise of the brewery, together with the goodwill and trade of the thirty-three public-houses, for seventeen years; that is, of the brewery, — with which brewery the occupiers of the thirty-three public-houses must deal during the term. The *tenendum*, likewise, treats the whole entirety, “to hold the said brewery, &c., and all and singular the privileges demised for the term of seventeen years.” If the whole had been at a joint rent of 500*l.*, there would have been great difficulty in contending that the whole of that rent should not have been taken into consideration in estimating the assessable value; and it seems to me to make no difference as to the point which we have to decide, that the *reddendum* divides the rent into three portions: 300*l.* in respect of the brewery, 50*l.* in respect of the fixtures, and 150*l.* “in respect of the good-will and trade of all and every the public-houses,” &c. In truth, the effect must be the same with this tripartite division as if the word “good-will” had never been introduced, and there had been a demise of the brewery adding, “with the occupier of which said brewery the publicans carrying on trade in the thirty-three public-houses specified in the schedule hereto annexed, are restricted and bound to deal for all the beer they sell to their customers during the term aforesaid,” — which would have been like the lease of a soke mill, describing it as a soke mill, or of a mill

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without any immemorial privilege, describing it as a mill to which a certain number of farmers were bound, by the covenants of their leases, to carry all their corn to be ground.

There are innumerable cases laying down the general principle, (which, indeed, is not disputed,) that if the occupation of real property is rendered more valuable by the occupier, thereby, as such occupier, making profits which would not be ratable, the assessable value of the real property he so occupies, may be enhanced by taking into consideration the profit which he so makes by such occupation. But I am only aware of one decision, which is closely in point, to assist us in applying that principle to the circumstances now before us. I mean *The Queen v. Bradford*, in which a canteen, in barracks, being demised to a tenant for a year, at a rent of 15*l.* for the canteen and buildings, and also the further sum of 510*l.* for the privilege of selling therein liquors, &c., it was held, that the two sums were to be considered as one entire rent for the canteen, and that the tenant was ratable to the poor as occupier of the canteen, in respect of the 525*l.* aggregate rent, and not merely in respect of the 15*l.*

I confess I cannot distinguish that case from the present. I conceive that the privilege was so valuable for the lessee of the canteen, by the regulations in force at the time of the lease, having exclusively the right to sell liquors to the garrison within the barracks; but supposing the great value of the privilege to have arisen entirely from the superior attraction of the canteen, to voluntary customers, the profits would not thereby be more ultimately connected with the occupation of the canteen, than if the lessee had, as an occupier of the canteen, enjoyed a monopoly. Lord Ellenborough says: "It is, in substance, but one entire rent, payable for the occupation of a real tenement, and for the enjoyment of the advantages belonging to it. We must judge of things as they really are, and not as they may appear to be; and, therefore, we are to consider here whether this be not substantially one entire rent, in respect of one entire subject, although artificially divided into several payments." The house and buildings called the canteen, however advantageous their situation might be, were not worth more than 15*l.* a year, to let, without the privilege of selling liquors to the garrison, but the privilege of selling liquors in the house and buildings was worth the further sum of 510*l.*, making an aggregate rent, which the tenant was willing to pay for the whole, of 525*l.* In respect of the whole of this sum he was held assessable, the assessment not being considered to be on the privilege, or the license, or the profits of trade, but upon the house and buildings rendered more valuable to the occupier, by the privilege which, as occupier, he enjoyed. I know not how, for the present purpose, that privilege is to be distinguished from the privilege which the appellant enjoys under his lease, of supplying beer from his brewery to the thirty-three public-houses, which, of necessity, must deal with him. The counsel for the respondents relied much upon the deterioration of the yearly value of these public-houses by reason of their being so restricted, instead of being free. But I do not see how this consideration can be of any avail as between the

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appellant and the parish, any more than if, from the excellent beer which he supplied to them, he added to their reputation, and along with their profits, he increased the rent at which they might be let. The obligation to grind at a particular mill, would, no doubt, to a certain degree, diminish the yearly value of a farm, subject to the servitude; but it is allowed, on all hands, that this deterioration would be no argument against making the miller assessable in respect of the multure involuntarily rendered to him. I have only further to observe, upon Mr. Heath's ingenious attempt to claim a deduction of 150*l.*, if he were chargeable with the amount, so that, by introducing *plus* and *minus* into the equation, this sum would, in effect, be struck out. But we are now arguing upon the supposition that the 150*l.* has been shown to be part of the rent, and I know not how it can be said that payment of part of the rent is an expense necessary to maintain the demised premises in a state to command the rent. In the canteen case, it might as well have been argued that the 510*l.* for the privilege of selling liquors ought to have been deducted from the 526*l.*, so as to leave the assessable value 15*l.*, and no more. For these reasons, with the most sincere deference to my brother Erle, who is strongly of the contrary opinion, I feel bound to say that I think there ought to be judgment for the respondents.

CROMPTON, J. I agree with the judgment of Lord Campbell, which has been read. I think the premises ratable for their value enhanced by the privilege which is attached to the brewery for the term of seventeen years. The rent reserved for the privilege, or monopoly, shows that it was worth the tenant's while to give so much more for the premises if their value was to be increased by the exercise therein of this monopoly. The mode of attaching this privilege to the brewery does not seem to be material. By the arrangement in the lease the privilege was secured, and that privilege clearly was worth 150*l.* a year, by increasing the value of the occupation to the tenant of the premises, as a brewery, during the term. The case seems to me to fall within the same class as those of the soke mill and the canteen; and I do not agree that these cases depend upon the principle of the privilege being itself ratable, as being of the nature of real property. That might, perhaps, be said of the case of the soke mills, where the monopoly arising from tenure may be considered as connected with the land, but in the case of the canteen, the privilege was the monopoly of supplying the soldiers. Nobody can doubt that it would have been a breach of the agreement in that case if another suttling place had been allowed to be set up. The enhanced value and increased rent was by reason of the monopoly, and the comparison of the case by the court and the counsel to the case of the soke mill, shows that the monopoly was the real ground of the increased value. In that case, like the present, the privilege was really secured by contract only, and was not attached to the land in any other way than in the present case. In one sense the privilege was to be used locally by the use of the canteen as the place for selling, just as in this case the benefit and advantage is to be

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enjoyed only at the brewery, and makes the brewery more valuable. The provisions in this lease were an arrangement for and had the effect of annexing the monopoly to the brewery for the term in question, and the value of the brewery was really increased by the rent in question, owing to this annexation. The monopoly was secured to the brewery, and, as I think, was confined to the brewery, and would not have been transferred by the appellant to, or enjoyed by him, at any other brewery. I think, therefore, that the rate should be confirmed.

ERLE, J. The facts of this case involve the true point of law under considerable complication; but, upon analysis, I believe the question to be whether premises are ratable for the price which the occupier thereof agrees to pay to a contractor for influencing customers to the business carried on therein. And the answer must be in the negative, for since the Parochial Assessment Act, only hereditaments are ratable, that is, land with its appurtenances, and a contract between the occupier and another person is not a hereditament. It is true that the contractor here, who sells his influence over the customers, happens to be the landlord of the premises, and the contract for the influence is contained in the instrument of demise, and the price to be paid annually for the influence is called "rent," and the persons to be influenced are also tenants of the same landlord. But if a traveller, with a good connection, agreeing to sell his influence to a tradesman who hired him, happened to be the landlord of that tradesman, and invested the sale in the demise of the premises, and called the price of the influence "rent," the accidental combination of the relation of traveller with that of landlord, and a misnomer in the use of the word "rent," would not constitute ratability, nor would the ratability of the premises be affected by the source of his influence over the customer, whether from the compulsory power of landlord or creditor, or from more friendly ties; also immaterial, as to ratability, would be the nature of the trade in respect of which the contract was made, such a contract would not become land in the case of a brewer more than in the case of a grocer or other tradesman. The ratability of a soke mill for the servitude of a mill in the servient district was supposed to be analogous, but the supposed servitude is, by the hypothesis, a legal appurtenance to the mill, and would pass with it upon a demise or sale of the land with its appurtenance. But if the mill had no legal privileges it would be ratable on ordinary principles, and the ratable value would not be altered by any personal contract for custom or for influence over custom which the miller for the time being might make with his landlord or any other person, and so of a brewery if it had a signory, and the publicans were bound, *ratione tenuræ*, to do service by buying beer at the brewery, the profit would be a profit on realty and ratable, but if this custom was obtained by contract or choice, the profit would be personal and not ratable.

In *The Queen v. Bradford*, a canteen was let at 15*l.* for the building, and 510*l.*, for the privilege of suttling to the barracks, and was

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worth to let with the privilege at 293*l.*, and was decided to be ratable at that sum; but the principle of the decision is, that the suttlings, which is called a privilege granted by the lessor, is an advantage arising from its local situation. "From its vicinity to the barracks, it would of course attract the custom of the neighborhood, and this is the incident to the property which renders it valuable," says Lord Ellenborough. "This canteen stands precisely in the same situation as a public-house, that is, it acquires a value from its situation, and its being fitted up as a public-house," says Le Blanc, J. Thus negating by the judgment, the ground on which the appellant in that case rested for exemption, namely, that the privilege was personal, arising by the grant to himself. Accordingly, if the publicans referred to in the lease of the present appellant, resorted to the brewery by reason of local convenience, it would be an incident to the property, as put by Lord Ellenborough; but, if it were made clear, as here it is, that they resort, by reason of personal consideration arising upon contract transitory with the persons of the contractors, the same judges would have held this brewery not ratable for the custom so obtained. The supposition that the public-houses are locally connected with the brewery, rests on no foundation. The influence is obtained from the accident that the same person is landlord of both, and creates a connection by his own contract. If the supposed profit from the custom of these public-houses is ratable, so would also be the profit from any other public-house whose custom the appellant might purchase, so would also be the profit from a contract that the appellant should have the supply of the landlord's shops. The distinction between the present case and those in which the separate values of two properties is increased beyond the aggregate of the two amounts by reason of the joint occupation of both, is apparent by comparing the occupation of the brewery and public-houses, with the occupation in the cases above referred to, of which the occupation of a farm jointly, with a close, affording convenient access from the farm to a road, has been put as an example. There the farm is occupied with the close, and the value of both is increased; here the brew-house is occupied separately from the public-houses. The profit to the brewery, arises from loss to the public-houses, and that exchange, and profit and loss, is occasioned by a contract, personal, between the two occupiers, and not from any local incident to the realty in either case. If the sum paid under this trade contract be ratable, the absurd conclusion that it should be deducted as a loss at the time it is rated as a profit, would seem to follow. For, by the hypothesis, it is an outgoing necessary to keep the custom of the public-houses to the brewhouse, and enable the brewhouse to get the profit therefrom, and, if so, it is expressly allowed as a deduction from the gross estimated rental, by the Parochial Assessment Act.

Rate confirmed.

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REGINA, on the Prosecution of THE OVERSEERS OF SUTTON, v. COOPER and others.

June 30, 1854.

Poor-Rate — Ratability of Local Board of Health — Yard occupied for repairing Highways — Public Purposes.

The corporation of H. were constituted the local board of health of the borough, and were by section 117, of the Public Health Act, (11 & 12 Vict. c. 63,) made surveyors of highways within the district. They rented and occupied a yard within the district as a place of deposit for stones, and other materials for the repair of the highways. This yard was situate in the parish of S., which was partly within and partly without the limits of the district: —

Held, that the local board of health occupied the yard as trustees, not for the public at large, but for the inhabitants of the district, who were charged with the obligation of repairing the highways, and that they were, therefore, ratable in respect of it, to the relief of the poor of S.

THIS was a rule calling upon H. Cooper and J. Gresham, esquires, two of the justices of the peace for the borough of Kingston-upon-Hull, and the local board of health in the said borough, to show cause why the said justices should not issue their warrant, for distress and sale of the goods and chattels of the said board, to levy certain sums of money assessed upon them by rates, for the relief of the poor of the parish of Sutton, in the said borough.

It appeared by the affidavits, that the mayor, aldermen, and burgesses of the borough of Kingston-upon-Hull, were, by a provisional order of the general board of health, confirmed by "The Public Health Act, 1851, No. 2," constituted by the town council, the local board of health, in the said borough; that is, within and throughout the entire area, places, and parts of places, comprised within the boundaries of the borough, as fixed for the purposes of the Municipal Corporation Act. The said local board of health were the occupiers of a yard and wharf, situate in Lime Street, in the said borough, and in the parish of Sutton; and by certain rates made by the churchwardens and overseers of the said parish on the 3d of March, and the 13th of September, 1853, for the relief of the poor of the said parish, the said local board were assessed as occupiers of the said yard and wharf, in the several sums of 1*l*. 18*s*. and 2*l*.; each of which rates was duly allowed and published. The local board did not appeal against either of these rates, but having refused payment thereof, a summons was obtained against the clerk of the local board, requiring them to show cause why payment of the said rates should not be made. This summons was attended before the two justices named in the rule, on the 12th of January, 1854, when application was made by the overseers for a distress warrant; but the clerk to the local board objected that the local board was a public body, and occupied the said yard and wharf for public purposes only, and not for the purpose of profit. Evidence was also given on the hearing before the justices, as the

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fact was, that a large part of the parish of Sutton is situate without the boundaries of the said borough and county of the town of Kingston-upon-Hull, that is to say, in the East Riding of the county of York. In answer to the evidence and to the objection by the clerk, the justices were referred by the overseers to the 4 & 5 Vict. c. 48, for rendering certain municipal corporations, of which Kingston-upon-Hull was one, ratable to the relief of the poor in certain cases; but the said justices refused to issue their distress warrant, or otherwise to compel payment of the said rates. It further appeared, by the affidavits, that, before the date of the provisional order, there were in the said borough, bodies of committees acting under local statutes for the paving, &c., of the said borough, the powers of which commissioners were, by the said order, transferred to the local board of health, who were also surveyors of highways in the said borough; and that for the purpose of duly executing their powers, as improvement commissioners and surveyors of the highways, they had hired the yard in question, for the purpose of depositing stone, gravel, and other materials for streets and roads.

Bovill showed cause on behalf of the local board.¹ The local board of health are not ratable in respect of the yard and wharf. By the 117th section of the Public Health Act, 11 & 12 Vict. c. 63, the duties of surveyor of highways are cast upon the local board, and they occupy the yard in question solely for the purpose of depositing materials for the repair of the highways, and not for any profit. According to the law, independently of the 4 & 5 Vict. c. 48, this was not a beneficial occupation. *The King v. Terrott*, 3 East, 506, and *The Queen v. St. George, Southwark*, 10 Q. B. Rep. 852, cannot be distinguished in point of principle from the present case. *The King v. Salter's Load Shuice Navigation*, 4 Term Rep. 730; *The King v. Liverpool*, 7 B. & C. 61; *The Queen v. The Mayor of Liverpool*, 9 Ad. & E. 435; *The Queen v. Manchester*, 3 El. & B. 336; s. c. 25 Eng. Rep. 145; *Gambier v. Lydford*, 23 Law J. Rep. (N. S.) Q. B. 69; s. c. 25 Eng. Rep. 141; *The Queen v. Shee*, 4 Q. B. Rep. 2; *The Queen v. The Justices of Worcestershire*, 11 Ad. & E. 57; *The Queen v. Exminster*, 12 Ibid. 2.

[ERLE, J., referred to *The Queen v. The Birkenhead Dock Trustees*, 21 Law J. Rep. (N. S.) M. C. 209; s. c. 14 Eng. Rep. 128.]

It is immaterial whether the district to be immediately benefited by the occupation of this yard, is the same as that for which the rate is made. *The Queen v. Badcock*, 6 Q. B. Rep. 787, and *The Queen v. Harrogate*, 15 Ibid. 1012; s. c. 1 Eng. Rep. 281, show that the occupation is for the benefit of the public at large, who all are supposed to be interested in the maintenance of good highways. In *The Queen v. Longwood*, 13 Ibid. 116, the persons deriving benefit were only a limited class.

[ERLE, J. The occupation of the yard is a benefit to those liable to highway rates, and in ease of their expenses.

¹ May 27, before COLERIDGE, J., ERLE, J., and CROMPTON, J.

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COLERIDGE, J., referred to *The Queen v. Sterry*, 12 Ad. & E. 84.]

It is somewhat difficult to draw the line very accurately between public and private purposes; but, as the highways must be deemed to be kept up for the benefit not only of the particular district, but also of all others who choose to use them, this occupation is not the subject of a rate according to the principles applied to the county court-house, in *The Queen v. Manchester*.

[CROMPTON, J. That would apply to all the sewers, &c., which are to be maintained by a district rate by section 86.]

Then, reliance is placed on the 4 & 5 Vict. c. 48, which renders municipal corporations ratable in respect of property applicable to public purposes; but here it is the local board of health, which is a distinct body from the municipal corporation, which is sought to be rated, and the act, therefore, does not apply.

[COLERIDGE, J., referred to *Le Feuvre v. Lankester*, 3 El. & B. 530; s. c. 25 Eng. Rep. 116.]

Bliss and *Thompson*, in support of the rule. First, this objection should have been taken by appeal against the rate, and is not now open to the local board of health. [The argument as to this point is omitted, as the court gave no decision upon it.] Secondly, this occupation is not for public purposes only, so as to prevent it from being a ratable subject. *The Queen v. Badcock*, followed by *The Queen v. Harrogate*, shows that, in order to prevent ratability, the occupation must be for the benefit of something more than a particular and limited class of persons. By section 84 of the Public Health Act, all premises, hired by the local board, are to be held for the purposes of that act; therefore, the occupation of this yard cannot be confined to the purpose of repairing the highways, but it may be used for any of the other specific purposes relating solely to the district. But, even if used solely for the repair of the highways, the public at large derive no benefit from these materials until after they have been used by the local board, who represent the district which is alone liable to repair. It could not be said that an individual, liable to repair a highway *ratione tenuræ*, would not be ratable for a place where he keeps the materials, for *quoad* himself the occupation is beneficial, although ultimately the repairs, when done, may benefit the public. Then, the 4 & 5 Vict. c. 48, applies, because all land, &c., hired by the local board is, by section 84 of the Public Health Act, to be held by them as a body corporate, that is, as the municipal corporation. *Nowell v. The Mayor, &c., of Worcester*, 9 Exch. Rep. 457; s. c. 25 Eng. Rep. 507. Section 140 would authorize the payment of these rates out of the general district-rates.

[CROMPTON, J. Would they not be included in "the expenses" provided for by section 87?]

Probably they would. Again, section 151 exempts premises occupied for the purposes of the act from window duty in certain cases, thereby leading to the inference that they are liable to other ordinary imposts.

Cur. adv. vult.

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Judgment was now delivered by

COLERIDGE, J. The question in this case for our decision, was the ratability of the local board of health, at Hull, to the poor-rate for a yard occupied by them, and it arises under the following circumstances: The town council of the borough is, by order of the general board of health, constituted the local board. The limits of the borough and the district of the board are coextensive, and the yard in question is wholly within these limits, but it lies in the parish of Sutton, which is partly within and partly without the limits, and the rate in question is made for the whole parish. The board has cast on it the duties of the surveyors of the highways, and the yard, in respect of which they are rated, is rented and occupied by them as a place of deposit for stones and other materials for the repair of the roads. They have not appealed against the rate, but refuse to pay the assessment; and the mayor and justices decline to issue their warrant of distress. Two questions were made: first, is not the objection, if any, exclusively a ground of appeal? secondly, are they ratable in respect of this occupation? These were argued before my brothers Erle and Crompton and myself, and the case stood over for consideration. We have come to a conclusion on the second of these points, which makes it unnecessary to consider the former, for we think the board of health is ratable under the circumstances; and, therefore, if the objection relied on had been taken by appeal, it would have been unsuccessful. In this case, the board of health may be considered as public officers of the borough of Hull. Among other duties, they are charged with the performance of an obligation which the law casts on the inhabitants, of repairing the highways in it; and in order to the discharge of this, they become occupiers of land lying in a district, which, in part, is not within the borough. It is clear that this land, under ordinary occupation, would contribute to the maintenance of the poor; if it ceases to do so, the burden of that maintenance must, *pro tanto*, be proportionally increased on the remaining rate-payers in the parish. And so far as regards those who occupy in that part of it which is without the limits of the borough, they are thereby made indirectly to contribute to the repairs of the highways within the borough. However trifling the amount may be on each rate-payer so circumstanced, in principle, this cannot be defended; nor can it be by authority. The case of *The Governors, &c., of the Poor of the City of Bristol v. Wait*, 5 Ad. & E. 1, is precisely in point, except that the parish, in which the plaintiffs there occupied, was entirely out of the limits for which they acted. They were acting in a public capacity; they occupied only in respect of it, and had not, in the popular sense, a beneficial occupation: that is, they did not individually derive any profit, but they were public officers, superintending the relief and maintenance of the paupers chargeable to the city of Bristol; and the court held, that this consideration did not relieve them from contributing, as other occupiers, to the rate in another parish, though their occupation was in order to the better discharge of that duty. But in the case of *The Queen v. The Wal-*

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lingford Union, 10 Ibid. 259, the respondent parish, in which the union workhouse was situated, was itself a parish in the union, which was composed of that and twenty-eight others; this brings it more near in point of fact, though we think not in principle, to the present case; and it was held, that a rate was well imposed, by the overseers of the respondent parish, on the guardians of the union. These cases, and more to the same effect, were endeavoured to be distinguished in the argument, on the ground that the appellants in them could not be considered as occupying for the benefit of the public at large, but only for a certain portion; but that here the board was discharging a duty to the whole public, all the liege subjects of the queen being entitled to use the highways, and interested in their maintenance. This, however, is to mistake the principle of the distinction relied on; the interest, here to be looked to, is not that of the queen's subjects in the enjoyment of good highways, but of the limited district — the borough — which is charged with the obligation of making and keeping them good, at their own expense. The board of health are parcel of that limited district, as well as public officers of it, and that district has a direct interest in reducing the charge of that maintenance; which interest is advanced by the occupation of the yard in question at a cheaper rate than it would cost if burdened with the payment of the assessment in question. The board of health, in other words, are trustees, not for the public at large, but for the inhabitants of the district for which they act. The rule, therefore, must be made absolute.

Rule absolute.

REGINA v. THE TRUSTEES OF THE WORTHING AND LANCING
TURNPIKE ROADS.

May 30, 1854.

Turnpike Road — Commissioners — Repair of Road — Contribution from Highway Rate — Public Health Act — Liability of District — Powers of Local Board of Health.

The hamlet of W., within and part of the parish of B., was, by a local act, constituted the town of W., and placed under the management of commissioners, and the surveyor of the highways was required to pay a proportion of the highway rates of the parish to the commissioners, W. continuing liable to contribute to the parish rates. By another local act, 7 Geo. 4, c. 10, "for maintaining a turnpike road from W. to L., and groynes, embankments, and other sea defences, for protecting such road and the lands adjoining from the future encroachments of the sea," trustees were appointed to carry the act into effect, with power for such purpose to levy and assess rates upon the owners of the land; and by section 47, the powers and authorities conferred by the former local act, were not to be affected, except that the commissioners were to be relieved from maintaining and protecting so much of the road as was within W. The Public Health Act, 11 & 12 Vict. c. 63, was afterwards applied to W., and a local board was appointed, which was to execute the office and have all the powers, &c., of surveyors of highways, except where such powers, &c., might be inconsistent with the act, and the inhabitants of any district were not to be liable to highway rate or other payment, not being toll, in respect of making or repairing roads or highways within any parish, township, or place, situate beyond the

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limits of such district. Portions of the turnpike road being out of repair, and the revenues accruing to the trustees under the local act being insufficient to keep it in repair and preserve the embankments, &c., an order was made, under 4 & 5 Vict. c. 59, upon the surveyor of the highways of B. for payment of a portion of the highway rates to the trustees, to be laid out in the repair of the portion of the turnpike road within the parish of B.; and this order being appealed against:—

Held, first, that the road in question was a turnpike road, within the 4 & 6 Vict. c. 59.

Secondly, that, by the 7 Geo. 4, c. 10, the management of the road was transferred from the commissioners to the turnpike trustees, the latter having the ordinary right to seek relief from the parish in case of the deficiency of funds, and the parish being liable to an indictment for non-repair of the road.

Thirdly, that, under the Public Health Act, the part of the parish without the district of the local board, in case of the deficiency of turnpike funds, was liable to contribute to the repair of any part, within the parish and not within the district, whilst the district alone was liable to contribute to the repair of any part of the road within it; the former powers of the surveyor of the parish to make a highway rate no longer existing, and the two parts of the parish being entirely distinct, for the purpose of contributing to the repair, both of the turnpike road, and of the general highways.

Held, also, that the local board of health were made the surveyors of the highways within the district, and empowered to make a highway rate for the purpose of contributing towards the deficiency of the turnpike funds; and that the order appealed against was, therefore, invalid.

On an appeal against an order of two justices of the western division of the county of Sussex, dated the 22d of June, 1853, whereby it was adjudged and ordered that a certain portion, to wit, the sum of 250*l.*, part of the rate or assessment to be levied by virtue of the statute 5 & 6 Will. 4, c. 50, in the said parish of Broadwater, should be paid by the surveyor or surveyors of the highways of the said parish, unto the respondents, or unto their treasurer, on or before the 1st of August next, to be by the said respondents wholly laid out in the actual repair of such part of the said turnpike road as lay within the said parish of Broadwater. The order was quashed, subject to the opinion of this court, on the following case.

The hamlet of Worthing has always been comprised within, and formed part of the parish of Broadwater. In 1821, by a local act, 1 & 2 Geo. 4, c. 59, certain commissioners were appointed for the general management of Worthing aforesaid, therein called and constituted "the town of Worthing;" and it was thereby enacted, (section 3,) that the said town should be coextensive with the said hamlet of Worthing, and that it should, notwithstanding the said act, continue to be part of the parish of Broadwater, and be subject to and charged with all rates, tithes, and other payments whatsoever as part of the said parish, in like manner as before the making and passing of the said act. By section 30 of the said act it was enacted, that when and as soon as any of the streets, lanes, ways, passages, and places, within the said town, which, before the passing of certain other acts, relating to the management of the said town, and which were thereby repealed, were repairable by the surveyor of the highways of the said parish of Broadwater, should be repaired and amended by the commissioners of the said town, the said surveyor should yearly and every year thereafter, so long as the said streets, lanes, ways, passages, and places should be kept repaired and amended by the said commissioners, pay, or cause to be paid to the

said commissioners a proportionate part, according to the respective lengths of such streets, lanes, ways, passages, and places, and of the other parts of the highways in the said parish, of the highway rate annually raised in the said parish. Within the limits of the said town of Worthing so defined as aforesaid is a certain ancient road or public highway, leading from Warwick Buildings, in the said town, towards the Horse Shoe Inn, in the parish of Lancing, which was repairable by the surveyor of the highways of the said parish of Broadwater, prior to the passing of the said two acts so repealed as aforesaid. In 1826, an act of parliament was passed (7 Geo. 4, c. 10) intituled 'An act for maintaining a turnpike road from Worthing to Lancing, in the county of Sussex, and groynes, embankments, and other sea defences, for protecting such road and the lands adjoining from the future encroachments of the sea,' whereby, after reciting that many parts of the said road had, of late years, been frequently injured and rendered impassable, by the overflowing of the sea, and certain lands adjoining such road, and situate in the said town of Worthing and in the parishes of Broadwater, Lancing, Sompting, and the hamlet of Cokeham, all in the said county, had been likewise damaged by the same means, and that the said roads and lands were still exposed to similar accidents, and that it was expedient for the benefit and convenience of the public that such road should be, in some places, diverted, widened, and raised, and that the said road, as well as the said lands, for the benefit of the owners thereof, should be effectually protected from the future overflowing and encroachment of the sea, by groynes, embankments, and other sea defences, and that the same should be made a turnpike road, certain trustees were appointed for carrying out the said act; and powers for making and maintaining the said road, and for taking and regulating tolls, were given to the said trustees and their successors, together with power to erect groynes, embankments, and other sea defences, and for the protection of the said lands, to levy and assess upon the owners thereof annual rates, to be applied with the said tolls to the general purposes of the said trusts; and it was also thereby provided and enacted (section 47) that nothing in that act contained should extend, or be deemed or construed to extend, to prejudice, diminish, alter, or take away, any of the rights, powers, or authorities vested in the commissioners for the time being, acting under the authority of the said act, 1 & 2 Geo. 4, c. 59, but all the rights, powers, and authorities, vested in them should be as good, valid, and effectual, as if the said act now in recital had not been made, saving except that they, the said commissioners, should from thenceforth be discharged of and from the expense of making and maintaining so much of the said road as was situate within the said town of Worthing, and of making and maintaining groynes, embankments, and other sea defences for the protection of the same. The said road was accordingly converted into a turnpike road, and was widened, raised, and diverted, in pursuance of the provisions of the said act. The whole of that portion of it which forms the subject of the said order of justices, lies within the limits of the said town of Worthing, and from time to

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time during the last six years has been damaged by the encroachment of the sea, and, at certain points, the road itself has actually been carried away, and a new portion of road was, in the winter of 1852, substituted. The surveyor of the said parish of Broadwater has annually paid, since the passing of the Worthing Town Act, 1 & 2 Geo. 4, c. 59, a certain sum of money to the commissioners of the said town out of the general highway rate of the said parish of Broadwater, as and by way of contribution towards the expense of repairing such parts of the highways lying within the limits of the said town, as the said commissioners had taken upon themselves to repair, and the said surveyor has, from the year 1834, paid to the said respondents the yearly sum of 27*l.* 10*s.*, up to the month of November, 1852, when such payments altogether ceased. In the last year, 1852, by an act of parliament, the town of Worthing, as a district, was brought within the provisions of the Public Health Act, 1848, 11 & 12 Vict. c. 63, and a local board was appointed, which it was declared should, within the limits of their district, exclusively of any other person whatever, execute the office of the surveyor of highways, and have all such powers, authorities, duties, and liabilities, as any surveyor of highways in England was then, or might thereafter be invested with, or be liable to, by virtue of his office, by the laws in force for the time being, except in so far as such powers, duties, or authorities were or might be inconsistent with the provisions of that act, and the inhabitants of any district should not, in respect of any property situate therein, be liable to the payment of highway rate or other payment, not being a toll in respect of making or repairing roads or highways within any parish, township or place, situate beyond the limits of such district. Portions of the original turnpike road in question, as well as the substituted new parts of it within the town of Worthing, being out of repair, arising from the encroachment of the sea, and the revenues accruing to the said respondents by virtue of the said act, 7 Geo. 4, c. 10, having, from divers causes, become quite insufficient to maintain the said roads, and keep up the said groynes and sea defences, application was made to the justices aforesaid, under the statute 4 & 5 Vict. c. 59, and the order appealed against was made by them; the proper notice of such intended proceedings having been served upon the appellant as surveyor of the highways of the parish of Broadwater, but no notice thereof having been at any time served upon the board of health of Worthing. The following, amongst others, were the material grounds of appeal: First, that the road in question was not a turnpike road, within the meaning of the 4 & 5 Vict. c. 59; secondly, that the appellant had no authority, under statute 5 & 6 Will. 4, c. 50, to pay the sum of 250*l.*, or any other sum, out of the highway rates, to be levied by him by virtue of the last-mentioned act of parliament, in the said parish of Broadwater, for the repairs of the said road; thirdly, that the town of Worthing being a district under the Public Health Act, and the local board of health for such district being under such act the surveyors of the highways of such district, which is part of the parish of Broadwater,

the said order was bad because no notice was given to the said local board, as such surveyors, of the intended application for such order; fourthly, that since the town of Worthing had been constituted a district under the Public Health Act, it was not competent to the said justices to make an order on the surveyor of highways of the said parish of Broadwater, to raise money within the said district for the repair of the said road; fifthly, that the appellant was only surveyor of that part of Broadwater which is not within the district of Worthing, and not of the whole parish, as supposed in the said order; sixthly, that the town of Worthing, part of the parish of Broadwater, was and is a district maintaining its own highways, and that the road in question is wholly situate within such town and district of Worthing, and that under the statute 4 & 5 Vict. c. 59, if the said order could be made on any one, it could only be made on the local board of health of such district of Worthing, as surveyors of the highways of such district; seventhly, that the said order was bad, inasmuch as it virtually repealed the 57th section of the Worthing and Lancing Turnpike Road Act, and the 117th section of the Public Health Act, 1848, 11 & 12 Vict. c. 63, and the provisions of the statute 5 & 6 Will. 4, c. 50. Each of the above-named acts of parliament were to be deemed part of the present case, and to be referred to by the court and the counsel on either side during the argument.

The questions for the opinion of the court were, first, whether such notice ought to have been served upon the board of health of Worthing; secondly, whether the order was rightly made, or whether it ought to have been made on the board of health of Worthing alone, or on the said surveyor jointly with the said board of health; thirdly, whether the statute 4 & 5 Vict. c. 59, as continued by subsequent statutes, applied to the Worthing and Lancing turnpike road. If the court should be of opinion that notice need not have been served on the board of health of Worthing, and that the order of the justices was rightly made, and that the statute 4 & 5 Vict. c. 59, as continued by subsequent statutes, applies to the Worthing and Lancing turnpike road, then the order of sessions was to be quashed, and the original order of justices to be confirmed; but, if the court should be of opinion that notice ought to have been served on the board of health of Worthing, or that the order of justices ought to have been made on the said board, either alone or jointly with the said surveyor, and not as aforesaid, or that the statute does not apply to the Worthing and Lancing turnpike road, then the said order of sessions was to be confirmed, and the original order of justices was to remain quashed.

May, 6th. *Johnson* and *Wyatt*, argued in support of the rule of Sessions, and referred to *Elmer v. The Norwich Board of Health*, 3 El. & B. 517; s. c. 25 Eng. Rep. 58; and *The Queen v. Hornsea*, 23 Law J. Rep. (N. s.) Q. B. 59; s. c. 25 Eng. Rep. 582.

Cowling and *Yates*, argued contra.

Cur. adv. vult.

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The judgment of the court (LORD CAMPBELL, C. J., WIGHTMAN, J., and CROMPTON, J.) was now delivered by

WIGHTMAN, J. At a special session for the highways, two justices made an order, under the 4 & 5 Vict. c. 59, s. 1, upon the surveyor of the highway of the parish of Broadwater, for payment of a sum of money to the trustees of a turnpike road, to be laid out in the repair of a part of the turnpike road, within the town of Worthing, in the parish of Broadwater. The Quarter Sessions, upon appeal, quashed the order, subject to the opinion of this court upon the facts stated in a special case. Upon the argument, in this case, three questions were raised for our consideration: First, as to whether the road in question is a turnpike road, within the meaning of the 4 & 5 Vict. c. 59, s. 1. Secondly, as to the effect of the 57th section of the 7 Geo. 4, c. 10, which, it was said, discharged the town of Worthing from the making and maintaining the road in question. And, thirdly, and principally, on the effect of the Health of Towns Act on the liability to contribute to the repairing of the road.

With regard to the first question, we intimated our opinion during the argument, that the road was a turnpike road, within the meaning of the 4 & 5 Vict. c. 59, s. 1. It was argued that the making the groynes for the defence of the road, was also an advantage to the owners of the land, which those groynes would defend from the incursions of the sea; and that money expended by the trustees upon those groynes, would enure to the benefit of those lands as well as to the benefit of the turnpike road; but the owners were to pay a definite annual sum, correctly and properly estimated, as we must suppose, with reference to the advantage they would derive. This sum would be in ease of the persons bound to repair the road; the act expressly constitutes it a turnpike road, and we see no reason whatever for thinking that this is not a turnpike trust within the meaning of the 4 & 5 Vict. c. 59, s. 1.

With regard to the second point, it was conceded that the exception at the end of the 47th section of this same Turnpike Act, had the effect of entirely relieving the town of Worthing from the liability of maintaining the road. The provision in question is contained in a clause for saving the rights of the commissioners of the town of Worthing, under a former act of parliament; and the clause in question enacts that the rights, powers, and authorities vested in those commissioners shall be good and valid, save and except that the commissioners shall be freed and discharged from the expense of making and maintaining so much of the road as is situate within the town of Worthing, and of making and maintaining groynes, embankments, and other sea defences for the protection of the same. We construe this enactment as taking the road out of the control of the commissioners, it being made by the other parts of the act a turnpike road, under the management of the turnpike trustees. Before the passing of the Turnpike Act, the road was under the management of the commissioners under the prior act, and it was proper, in subjecting it to the management of the turnpike trustees, to say that the commissioners should no longer have the control over it, and should

be freed from the obligation of maintaining it. The effect seems to be, that the management of the road was transferred from the commissioners to the turnpike trustees, and the road became, in effect, a turnpike road, under the management of trustees, having the right under the statutes, to seek relief from the parish, in case of deficiency of their funds, the parish remaining liable to indictment at common law for the repair of the road.

Assuming, then, that the road in question was a turnpike road, within the meaning of the 4 & 5 Vict. c. 52, s. 1; and that the liabilities of the trustees, and of the parish, were, after the passing of the Turnpike Act, the same as in the case of ordinary turnpike trusts, the remaining question, which is one of some difficulty, and of equal general importance, is, as to the effect of the Health of Towns Act, when the town of Worthing became a district under the provisions of that statute. By the 68th section of the Public Health Act, the streets, which, by the interpretation clause, include all highways not being turnpikes, are vested in the local board, who are charged by the act with levelling, paving, flagging, channelling, altering, and repairing the same. Turnpike roads appear to have been excluded from these provisions, for the purpose of their being left under the control of turnpike trustees. We held, in *Elmer v. The Norwich Board of Health*, that the expenses of repairing the highways within the district, which are expressly charged by the act upon the local board of health, were to be defrayed by a district rate under the act, and not by a highway rate. We are now to consider how the contributions for the repair of that part of a turnpike road, which lies within the district of a local board of health, part of a parish, is to be raised. By the 117th section of the act, the local board, within the limits of the district, are, exclusively of any other person, to execute the office of, and be surveyors of highways, and to have all the powers, duties, and liabilities of surveyors of highways, except so far as is inconsistent with the provisions of this act. In the *Norwich Case*, before referred to, we intimated our opinion that the local board became the surveyor of the whole district, and not the surveyor of any particular parish within the district. In the present case, no question as to different parishes within the district arises, the whole district forming part of the parish of Broadwater. By the express words of this provision, the surveyors of the entire parish, were excluded from executing the office of, or being surveyor of highways within the district; and the local board are to have the powers, duties, and liabilities, except when inconsistent with the provisions of the act. Then follows the very important part of the 117th section, upon which the counsel for the surveyors of the parish mainly relied: "And the inhabitants of any district shall not, in respect of any property situate therein, be liable to the payment of highway rate, or other payment, not being a toll, in respect of making or repairing roads or highways within any parish, township, or place, or part of any parish, township, or place, situate beyond the limits of such district." Nothing can be more strong than this provision, to show that the local district is to be entirely relieved from all rates or payments not being a toll, in

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respect of the repair of all roads or highways in any spot beyond the limits of the district. The clause is not like the 68th section, which uses the word "street," explained by the interpretation clause to include highways exclusive of turnpike roads; but the clause uses the word "road" as if expressly to extend to all roads, and not to be confined to highways not turnpike, the management of which is vested in the local board. The exception, also, of the payment of tolls, appears to show that turnpike roads were not excluded from this provision. The effect of this provision, exempting the inhabitants of the district from payment of the repairs of any road out of the district, coupled with the preceding provision by which the duties and liabilities of the surveyors of the district, are thrown exclusively upon the local board, appears to us to be that the liability to contribute to repair in the event of a deficiency of the turnpike funds is divided, and that the part of the parish without the district, remains liable to contribute in case of deficiency to the repair of any part within the parish, and not being within the district, whilst the district remains alone liable to such contribution for the repair of any part of the road within the district. After the words of the 117th section, which so expressly excludes any exercise of the powers of the parish surveyors within the district, and after the immediately subsequent provision, which expressly relieves the inhabitants of the district from liability to any payment for the repair of any road beyond the limits of the district, it seems to us quite impossible to hold that the former powers of the surveyors of the entire parish, remain so that they could make a general rate upon the inhabitants of the parish, including the district for the repair of any part of the road situate in the parish of Broadwater, without the district. And, if the whole parish cannot be made to contribute as to what lies out of the district, it would be manifestly unjust to the part of the parish without the district, that the whole parish should be taxed for the repair of the part within the district of Worthing, and the statute takes away all power of the parish surveyors to interfere in the district. The only way of carrying out the intention of the legislature, appears to us to be by holding that the two parts of the parish become entirely distinct, for the purpose of contributing towards the repair of the turnpike roads, as well as for that of repairing the general highways; and we see no difficulty in the local board being ordered to make contribution under the 4 & 5 Vict. c. 59, in the case of a deficiency of the turnpike funds. It would be sufficient for the decision of the case, to say, that the power of the surveyors of the parish to make any rate upon the inhabitants of the district, is gone; but, we think it right to say, with reference to the question proposed to us, and for the future guidance of the parties, that we think that the local board of health may well make a highway rate for the purpose of meeting such a contribution as that in question. Their powers as surveyors, within the limits of the district, seem amply sufficient for these purposes.

It will be seen that the effect of our decision in this and the *Norwich Case*, is, that whilst the expense of the repairing and doing the other matters to the streets and highways which is expressly made a charge

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upon the local board by the Health of Towns Act, is to be defrayed out of a distinct rate; any sum to be paid by way of contribution towards the deficiency of the funds of a turnpike trust, under the 4 & 5 Vict. c. 59, is to be raised by the local board as surveyors, by a highway rate.

This is in conformity with the observations of the late Mr. Lawes, in the notes to his edition of the Health of Towns Act, in one of which, (see note p. 152,) after stating the difficulties that have arisen, he comes to the conclusion that the expense of repairing and dealing with the streets, including highways, expressly charged on the local board by the act, are to be defrayed by a distinct rate; whilst in the note p. 187, he observes, that the local board may still have to levy a highway rate for purposes other than the matters thrown on the district rate by the act. The raising a sum of money for contribution towards the repair of a turnpike road, seems a matter for which the local board would have to resort to the powers of rating under the Highway Act, transferred to them by the 117th section of the Health of Towns Act.

The order of the two justices in question, having been made against parties having no fund applicable by law to the purpose in question, and no power to raise such a fund, is bad, and the Court of Quarter Sessions were right in quashing the order. Our judgment is, therefore, that the order of Sessions quashing the order of the magistrates, be confirmed.

Order of Sessions confirmed.

IN THE EXCHEQUER CHAMBER.

BOUGLEAUX v. SWAYNE, and others.

June 1, 1854.

Costs in Error — Security — Foreigner residing Abroad.

Plaintiff in error, was a foreigner residing abroad, and had given security for costs in the court below. This court, after joinder in error, stayed proceedings until security was given for the costs of the proceedings in error.

THIS was an action upon a deed relating to a patent. There was a special verdict, upon which the court below gave judgment for the defendants in last Hilary term, January 30, (not reported.) The plaintiff below thereupon brought a writ of error, which stood for argument on this day. The plaintiff in error was a foreigner residing abroad, and had given security for costs in the court below. After joinder in error an application was made to the court below by the defendants in error, that the proceedings in error should be stayed

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until the plaintiff in error had given security for the costs of the proceedings in error; but Crompton, J., to whom the application was made, declined to interfere.

Bovill, for the defendants in error, moved that all proceedings should be stayed, or that the plaintiff in error should give security for the costs of the plaintiff in error. [He referred to *Pray v. Edie*, 1 T. R. 267; *Benazech v. Bessett*, 1 C. B. 313; 9 Jur. 376; *Haggarth v. Wilkinson*, in error, 12 Q. B. 851; and *Lewis v. Ovens*, 5 B. & Al. 265.]

Karslake, contra. It is sufficient that the defendants in error have got their security for the costs in the court below; a writ of error is to be considered as a step in the cause, and is the right of the party. [He cited *Jones v. Jacobs*, 2 Dowl. 442, and *Kent v. Poole*, 7 Dowl. 572.] Further: the application is too late, being made after joinder in error.

JERVIS, C. J. The writ of error is substantially a new proceeding, and therefore this application is well founded in principle, and security for costs must be given.

POLLOCK, C. B., ALDERSON, B., MAULE, J., CRESSWELL, J., PLATT, B., MARTIN, B., and CROWDER, J., concurred.

Application granted.

BAIL COURT.

MITCHELL v. HENDER.

April 27, 1854.

County Court — Concurrent Jurisdiction — Place of carrying on Business.

A surgeon, having a fixed residence, but attending upon his patients at their houses in several parishes, carries on his business within the jurisdiction of the county court in which those parishes are situate.

THIS was an action to recover from the defendant the sum of 10*l.* 16*s.* 8*d.* for work done by the plaintiff in a certain mine, the defendant being a shareholder in the mine. The cause was tried under a writ of trial before the undersheriff of Cornwall, and a verdict returned for the amount claimed. The mine was situate in the parish of Altarnum, in Cornwall, within the jurisdiction of the county court of Launceston, where the plaintiff dwelt during the performance of the work and when the suit was commenced, and he was retained there by the captain of the mine to perform the work. The defendant was a

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surgeon and apothecary, dwelling and carrying on business at Callington, within the jurisdiction of the county court of Liskeard. In his affidavit, however, it was sworn that "he doth, and at the time, &c., did, carry on his profession or business of a surgeon, apothecary, and accoucheur, within the jurisdiction of the county court holden at Launceston, in the said county, and there did, and now does, daily attend to the several patients of him, this deponent, requiring his advice and attendance as such surgeon, apothecary, and accoucheur, (such patients being resident within the several parishes of Stoke Clemsland, Northell, and Leazant, and the said parish of Altarnum,) at and within the said last-mentioned several parishes, all of which are situated wholly within the jurisdiction of the county court of Cornwall, holden at Launceston aforesaid." It further appeared by the affidavit, that at the time of bringing the action he was appointed by the guardians of the Launceston Union to attend paupers at their residences in one of the parishes of the union within the jurisdiction of the county court of Launceston. The defendant was a partner in the mine at Altarnum. The lease and cost-book were given in evidence, and were proved to have been executed by the defendant, at Callington, which was less than twenty miles from the plaintiff's dwelling. Upon the above facts an application was now made, on the part of the plaintiff, for the costs of the action, under the 15 & 16 Vict. c. 54, s. 4.

Maynard, for the plaintiff. This case is within the concurrent jurisdiction clause of the County Courts Act, 9 & 10 Vict. c. 95, s. 128, as the cause of action did not arise wholly, or in some material point within the jurisdiction of the county court within which the defendant dwells or carries on his business. That section contemplates the carrying on business in some fixed locality. A surgeon can only be said to carry on his business where he has his surgery and dispenses medicines, and does not carry on his business in the several districts where he visits and attends his patients. *Rolfe v. Learmouth*, 14 Q. B. 196.

[COLERIDGE, J. Suppose a retiring partner covenanted not to carry on business within twenty miles of the original place of business, and he attended patients within that distance, would not that amount to a breach of his covenant? Some apothecaries do not keep a shop. Does not an accoucheur carry on his business at the houses of those he visits professionally?]

In *Buckley v. Hann*, 5 Exch. 43, it was held, that a clerk who resided out of the city of London, but attended daily at an office within the city, was not a person carrying on business within the city. The whole of the business must be carried on within the district. *Stephens v. Derry*, 16 East, 147; *Gray v. Cook*, 8 East, 336. Again: the carrying on business must be personal, and therefore the fact of the defendant being a partner in the mine at Altarnum does not satisfy the statute. The defendant's affidavit does not expressly state that he had any patients within the parishes mentioned.

[COLERIDGE, J. But the defendant states that he daily attends his

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patients there; and that must mean that he has patients there to attend. He cited *Johnson v. Ward*, 7 C. B. 868, and *Room v. Cottam*, 5 Exch. 820; s. c. 1 Eng. Rep. 505.

Collier showed cause in the first instance. The lease and cost-book were executed at Callington, in the Liskeard county court district; and this was a material point of the cause of action. *Roff v. Miller*, 14 Jur. 746; *Norman v. Marchant*, 7 Exch. 723; s. c. 12 Eng. Rep. 576.

[COLERIDGE, J. They were material evidence; but every thing necessary to be proved, is not part of the cause of action. The action was not upon the lease; the work done by the plaintiff, and his employment by the defendant, were the cause of action. He cited *Heath v. Long*, 1 Lownd. M. & P. 333.]

The authority to employ the defendant was given where the cost-book was signed.

Maynard replied.

COLERIDGE, J. This rule must be refused, upon the ground that the defendant carried on his business within the jurisdiction of the county court of Launceston. These affidavits should be framed with sufficient strictness to enable us to see that there is no evasion of the statute, and that, in substance, it has been complied with. The defendant states, that he "did, and now does, daily attend several patients resident in parishes, which are within the jurisdiction of the Launceston county court." This is an averment that he has patients there, and attends them, and to attach any other meaning to the words, would be a mere trifling with words. The construction of the 128th section of the act of parliament, ought not to be governed by that which has been put upon statutes wherein the words are not precisely the same. The words are: "where the cause of action did not arise wholly, or in some material point, within the jurisdiction of the court within which the defendant dwells or carries on his business at the time of the action brought." The section, therefore, points out as the circumscribed locality, not a mathematical point, but the jurisdiction of the court, covering a considerable area. I think that business carried on by agency only within these limits, is not sufficient. The dwelling or the carrying on of the business must be personal; but, if the nature of a man's business is to be moving about, I think that, whilst so moving about, he is carrying on his business. The defendant says, that he is daily attending patients, as a surgeon, apothecary, and accoucheur, within the several parishes mentioned in the affidavit. He carries on his business, therefore, within the county court district in which those parishes are. Several cases have already been decided. The first is that of *Rolfe v. Learmouth*, in which the deputy sealer of the writs, whose duty it was to attend upon the lord-chancellor, wherever he might be, was the defendant: it was held, that he did not carry on business at any fixed place. *Buckley v. Hann* was decided upon the authority of *Rolfe v. Learmouth*.

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Stephens v. Derry was a decision upon a different act of parliament, the London Court of Requests Act, 39 & 40 Geo. 3, c. 104; the residence of the defendant was in Middlesex, where his wife carried on business, he himself being employed as a clerk in the office of a solicitor in London: the judges held, that the defendant was seeking his livelihood where he was residing, and where his wife was carrying on the business. *Gray v. Cook* was under the same statute. On the whole, therefore, this rule must be refused.

*Rule refused.*¹

DOWDELL v. THE ROYAL AUSTRALIAN MAIL STEAM NAVIGATION COMPANY.

June 15, 1853.

Taxation of Costs — Party Witness in his own Cause — Rule for new Trial — Maintenance Money — Seafaring Man.

In an action by a seafaring man, for wrongful dismissal from the service of a steam-packet company, plaintiff having obtained a verdict, a rule *nisi* for a new trial was obtained by defendants, which was, after argument, discharged. On taxation of costs, the master allowed plaintiff maintenance from the time of granting the rule to the time of discharging it, on the ground that plaintiff was a necessary witness, and that he could not be ready to give evidence on the second trial, unless he had remained in London, and that he had no means of earning his subsistence in London. The court, under the peculiar circumstances of the case, declined to disturb the conclusion of the master, but held, that, as a general rule, such costs ought not to be allowed.

RULE calling upon the plaintiff to show cause, why the master should not be at liberty to review his taxation of costs herein. It appeared that the action, which was for wrongfully dismissing the plaintiff from the service of the defendants, was tried at the Middlesex Sittings, on the 3d December, 1853, when a verdict was found for the plaintiff, damages 40*l*. A rule *nisi* for a new trial, on the ground of the verdict being against the evidence, was obtained by the defendants in Hilary term, January 14, which was argued and discharged in Easter term, and the master, on taxation, made his allocatur, and allowed to the plaintiff maintenance money from the commencement of the action to the day of the date of the discharge of the rule. The affidavit of the plaintiff, on which the master acted, stated that the plaintiff was a seafaring man, and had been detained in this country from the time of the commencement of the suit, namely, the 5th September, 1853, until the 8th May, 1854, for the

¹ But see *Nussey v. Glendinning*, in the full court, (May 11,) a note of which will be found in 23 Law T. 93, where a similar question arose, the defendant in that case being a higler, and travelling about with goods. It was held, that "something like abiding permanency is wanted to constitute a carrying on of business within the meaning of the statute."

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purpose of the cause, and in order that he might be present and give evidence, on his own behalf, on the trial of the cause: that he was advised by his solicitors, and believed, that his attendance was absolutely necessary, and that the cause could not have been safely tried without his being present to give evidence; that the cause was tried on the 3d December last, when he was examined, and gave evidence on his own behalf; that, during the whole time of his detention in this country, he had not earned any money or reward of any kind, but, on the contrary, had been wholly unemployed, and unable to exercise and act in his ordinary occupation of a ship's purser; that during the time of his detention he had had numerous opportunities of employment in the way of his business, but had been wholly unable to avail himself of any such employment, by reason of his being necessarily detained in this country, on this cause. In this term,¹

Gray showed cause. Statute 14 & 15 Vict. c. 99, which, by section 2, allows parties to be witnesses, puts the party in the same situation as a witness as to costs. *Howes v. Barber*, 16 Jur. 614; s. c. 10 Eng. Rep. 465. If this had been the case of another witness, the party to the cause would have been entitled to the costs of detaining him, after notice of the rule *nisi*, for a new trial, the action being still pending: if the rule *nisi* was made absolute, and the witness had not been detained, his absence might have caused a postponement of the trial. There is no reported case in which the question as to the allowance of such costs, has been determined, but it occurred incidentally in *Mount v. Larkins*, 8 Bing. 195. [He also cited: *Tremain v. Barrett*, 6 Taunt. 88; 1 Marsh. 563; and *Loneragan v. The Royal Exchange Assurance Company*, 7 Bing. 725; 5 Moo. & P. 447; 1 Dowl. 223.] It was a reasonable thing for the plaintiff, under the circumstances, to stay in England, in order to give evidence in case the defendants obtained a new trial.

[LORD CAMPBELL, C. J. Suppose the plaintiff had subpoenaed all the crew on the first trial, would he have been justified in detaining them all, after the rule *nisi* had been granted?]

It would be for the master to say, whether they were material witnesses.

[WIGHTMAN, J. You would say that he might detain all the witnesses whose costs the master allowed on the first trial.

LORD CAMPBELL, C. J. Provided their attendance could not be otherwise obtained on the second trial.]

In the case of mariners whose voyages were short, the detention might not be necessary.

Lush, contra. Maintenance money has never been claimed for a witness after the time of obtaining a rule *nisi* for a new trial, by reason of the probable expectation, that he would be wanted as a

¹ June 8, before Lord CAMPBELL, C. J., COLERIDGE, J., ERLE, J., and CROMPTON, J.

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witness on the second trial; and there is no reason for making such an allowance in favor of a party, because, though it might be prudent for a party to detain a witness under such circumstances, he has complete control over his own movements; also, as a party, he is not entitled to expenses.

[CROMPTON, J. Would the fees for retainers be allowed, if they were renewed on a rule *nisi* for a new trial, which it might be a prudent thing to do?]

No. When a rule *nisi* for a new trial is granted, may a party send to Australia for a material witness, in the expectation of another trial?

[WIGHTMAN, J. In this case the plaintiff had succeeded mainly on his own evidence.]

The delay which occurs before a rule *nisi* is disposed of, is the act of the court, for which the defendants ought not to suffer.

[COLERIDGE, J. The defendants made an application which has failed.]

LORD CAMPBELL, C. J. Suppose the rule *nisi* had been obtained by false affidavits, it would be hard that the plaintiff should have the expense of maintaining himself until it was disposed of.]

The affidavit of the plaintiff only says, that he lost opportunities of employment as purser. He might have had other occupation on board a vessel, which would have returned in time for the second trial.

Cur. adv. vult.

June 15. LORD CAMPBELL, C. J., said: After much hesitation and great doubt, we have come to the conclusion that this rule should be discharged; but, we are anxious that it should not be considered that we lay down a general rule, that, where the court grant a rule to show cause why there should not be a new trial, a witness may be detained at the expense of the losing party.

The circumstances of this case were peculiar. The plaintiff brought his action for his dismissal from the service of the Steam-packet Company, by whom he had been hired as purser. He was a witness for himself at the trial, and the material and almost the only witness. He obtained a verdict. Upon a motion for a new trial, the court granted a rule to show cause, which was, after argument, discharged. On the taxation of costs, the master made an allowance to the plaintiff for his maintenance from the time when the rule to show cause was granted to him, to the time of its discharge; but, it was only on the ground that he was a material witness, and that he could not have been ready to give evidence at the second trial, unless he had remained in London, and that his remaining in London deprived him of the means of obtaining his subsistence by going abroad, and that in London he had no means of earning his subsistence. This was a loss cast upon him by the resistance of the company to pay his demand, and an expense incurred by their obtaining a rule to show cause why there should not be a new trial. We think that, under the peculiar circumstances of the case, this may be considered as part

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of the costs of the rule for the new trial, which was discharged. We must take it, that the master considered the evidence of the plaintiff indispensable, and that by his remaining in London, under the circumstances, these costs were incurred; therefore, we decline to disturb the conclusion to which the master has come, by saying that these costs ought not to be allowed.

But, we must cautiously guard against the abuse which might arise from the parties to the cause being now allowed to be witnesses for themselves. As parties, they are not entitled to any allowance, in respect of their attendance at the trial, to superintend the conduct of the cause; and we must take care lest, under pretence of being a witness, the party to the cause should obtain an allowance, which he is not entitled to as a party. This is not to be drawn into a precedent for a general rule, that costs of witnesses should be allowed between the time of granting a rule and the time of discharging it.

Rule discharged, without costs.

CHURCHILL v. SIGGERS.

June 15, 1854.

Ca. Sa. — False Indorsement on Warrant — Injury and Damage.

Allegation that the defendant, upon a writ of *ca. sa.*, properly issued at his instance, for a large amount, but a great part of which had been afterwards satisfied, had falsely and maliciously, and without any reasonable or probable cause, procured the sheriff to issue a warrant to take and keep the plaintiff, &c., and had falsely and maliciously, and without any reasonable or probable cause, procured the said warrant to be indorsed to levy the larger amount; whereupon the plaintiff had been taken and detained for four weeks, and whereby he had suffered in his business and credit: —

Held, upon demurrer, to disclose a sufficient cause of action; for it was alleged that the act was malicious, &c., and such an act might injure the plaintiff, as by rendering it more difficult for him to raise means to satisfy the debt really due; and it was alleged, in effect, that it had conduced to some part, at least, of his detention in prison.

DECLARATION, that before the grievances, &c., the plaintiff, at the request and for the accommodation of one Mary Ann Helps, accepted two several bills of exchange drawn on, &c., by the said Mary Ann Helps, &c., (for 68*l.* and 32*l.* 10*s.*.) which said bills were indorsed by the said Mary Ann Helps in blank; and thereupon the defendant, well knowing, &c., discounted, &c., and the defendant then became and was the legal holder, &c.; and thereupon, afterwards, the said Mary, &c., married one Cheese; and thereupon, and before the grievances, &c., and after the bills became due, the defendant commenced and prosecuted two separate actions upon the said bills, that is, one against the plaintiff, as acceptor, &c., and the other against Cheese, by reason of his wife, &c., having been the drawer, &c.; and such

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proceedings were had, &c.; that afterwards, and before the grievances, &c., the now defendant recovered against the now plaintiff the amount of the said bills, to wit, 100*l.* 10*s.*, with interest, 48*s.*, and to wit, 12*l.* 4*s.* for costs, making in all 115*l.* 2*s.*; and thereupon, afterwards, to wit, on, &c., the now defendant caused to be issued, on the said judgment against the now plaintiff, a writ of *ca. sa.*, directed, &c., to take the now plaintiff, &c., so that he might have his body, &c., to satisfy the now defendant 115*l.* 2*s.*, which, &c., together with interest from, &c., and which said writ was indorsed, &c., to levy the said sum of 115*l.* 2*s.*; together with interest; which said writ the now defendant delivered to, &c., the sheriffs, &c.; and the said sheriffs, whilst, &c., made their warrant, &c., to take and keep the plaintiff to satisfy the said sum of 115*l.* 2*s.* and interest, &c.; and the said warrant was not executed whilst the said, &c., were sheriffs, &c., and thereby the said warrant expired, &c.; and after the said *ca. sa.* had been issued against the now plaintiff, and the said warrant granted, and whilst it was unexecuted, &c., to wit, on, &c., the now defendant caused to be issued in the said action against Cheese a *capias* to take Cheese, until he should give bail, or otherwise satisfy, &c., which said *capias* was delivered to the sheriffs, &c., indorsed for bail for 100*l.*, &c.; and afterwards the said sheriffs, before, &c., took the said Cheese, &c.; and thereupon, and before the grievances, &c., the said Cheese paid to the now defendant, and the now defendant accepted, 110*l.* 10*s.* for debt and costs, &c.; and thereupon the whole causes of action on the said bills, &c., against Cheese were satisfied, &c. And the plaintiff further saith, that after the said cause of action was so fully satisfied as aforesaid, and after the said warrant upon the said *ca. sa.* had expired by reason of the term of office of the said, &c., sheriffs, &c., having expired, the defendant falsely, maliciously, and without any reasonable, or probable cause, caused and procured, &c., who were then sheriffs, &c., to make and grant their certain other warrant, &c., upon the said *ca. sa.*, &c., to take the now plaintiff, and &c., to satisfy the said sum of 115*l.* 2*s.*, &c.; which said warrant was then indorsed with a direction to levy the said sum of 115*l.* 2*s.*; and thereupon the defendant falsely and maliciously, and without any reasonable or probable cause, &c., caused and procured the said last-mentioned warrant to be delivered to the bailiffs, and falsely and maliciously, and without any reasonable or probable cause, caused and procured the said bailiffs to arrest the plaintiff upon the said warrant, to satisfy the said 115*l.* 2*s.* so pretended to be due as aforesaid; and the plaintiff was accordingly, on, &c., taken and imprisoned on such warrant, and lodged, &c., and there kept, &c., upon and by virtue of such last-mentioned warrant, to wit, four weeks, until the plaintiff was discharged by a judge's order, &c. And the plaintiff further saith, that when, &c., the judgment upon which, &c., was upon a debt amounting, to wit, to the aggregate of the said two bills of exchange as aforesaid, and that such debt was the only sum, exclusive of costs, recovered by such judgment, and that at the time of such arrest and imprisonment of the plaintiff as aforesaid such debt did not exceed 20*l.*, exclusive of costs, &c. And the plaintiff saith, that by means, &c., he was not only pre-

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vented from attending his business, and was injured in his credit and character, but also, by means, &c., he was put to and incurred costs, &c., to wit, &c.

Demurrer.

Ogle, in support of the demurrer. First, there is no cause of action distinctly stated. It is left in doubt whether the plaintiff complains of being arrested for a debt less than 20*l.*, or for being arrested under a warrant indorsed to levy 115*l.* instead of 15*l.* If the first be the cause of action, it appears upon the face of the declaration to be unfounded, for it is shown that the judgment upon which the *ca. sa.* issued was for 115*l.* 2*s.*; and although, in consequence of the alleged payment of 100*l.* by Cheese, 15*l.* only appears to have remained due when the warrant was executed, yet in such case the 7 & 8 Vict. c. 96, s. 57, does not apply. And if the second be the cause of action relied on, it also is insufficient. Though the act of indorsing the warrant to levy too large an amount were an injury, yet there is no damage which can result from it; and there must be both injury and damage in order to sustain an action *ex delicto*. *Tancred v. Leyland*, 16 Q. B. 664; s. c. 3 Eng. Rep. 482; *Gallwey v. Marshall*, 9 Exch. 294; s. c. 24 Eng. Rep. 463.

[LORD CAMPBELL, C. J. If the injury be once established, it is not necessary to show more than nominal damages. But the question in this case is, whether it is shown that there was any injury.]

CROMPTON, J. The execution, that is, the taking of the plaintiff into custody, was clearly authorized. The question is, whether, upon a warrant under a *ca. sa.* the indorsement to levy, is material. Is it necessary to put in the sum to be levied? What has the sheriff to do with the sum in the case of a *ca. sa.*? He has to take the person, whatever be the amount of the debt.]

Pearson, in support of the declaration. Though the cause of action were ambiguously stated, it would be no ground for impeaching the declaration on general demurrer. If the cause of action be taken to be for an arrest for a debt less than 20*l.*, it is sufficient. The real meaning of the 7 & 8 Vict. c. 96, s. 57, is, that the arrest shall not be made, if, at the time of the arrest there be only a sum less than 20*l.* due upon the judgment.

[LORD CAMPBELL, C. J. You can hardly rely upon such doctrine. The cause refers to judgments recovered for 20*l.*, or less. Here the judgment recovered was for more than 20*l.*]

Then the second supposed cause of action is sufficient. It is surely an injury falsely and maliciously to impose upon a man the necessity of finding 115*l.* in order to relieve himself from arrest, rather than 15*l.*, which is all he ought to be put to find.

[CROMPTON, J. But if the plaintiff would pay neither, how was he wronged? The defendant had a right to take his person in execution in this case, if he would not pay the smaller sum.]

There are numerous cases to show that it is a good cause of action against a suitor that he has maliciously delivered to the sheriff a warrant

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upon a *ca. sa.*, with directions to levy more than was due. *Saxon v. Castle*, 6 Ad. & El. 652; *Gough v. Cribb*, 11 M. & W. 497; *Page v. Wiple*, 3 East, 314; *De Medina v. Grove*, in error, 10 Q. B. 172; *Austin v. Debnam*, 3 B. & Cr. 139.

[LORD CAMPBELL, C. J. If you can make out that this was virtually an arrest for 115*l.*, the analogy between this case and those you have cited, will be close. But is this so in law?

CROMPTON, J. The sheriff could not receive money on a *ca. sa.* He is bound by the writ to produce the person. What difference does it make that he is told to do so as for a larger or a smaller debt?]

In *Wentworth v. Bullen*, 9 B. & Cr. 840 849, Parke, B., "It is said that the plaintiff sustained no damage, for he was lawfully imprisoned; and imprisonment was the grievance. But the condition of a prisoner is materially different when he is charged in execution for a large and for a small sum. In the latter case, his friends may make efforts to relieve him, which they would not in the former."

[LORD CAMPBELL, C. J. If there had been a tender to the defendant, or his attorney, of every thing really due, and afterwards a malicious detainer by them, there is but little doubt that there would have been a good cause of action; but I still do not see what injury could arise in this case, from the alleged improper indorsement.]

Ogle, in reply. It does not even appear that the indorsement complained of was the act in any way of the defendant or his agents. According to the usual course of business, that indorsement on the warrant is made, not by or on behalf of the suitor, but in the sheriff's office, by his agents.

Cur. adv. vult.

LORD CAMPBELL, C. J., now delivered the judgment of the court. We are of opinion that, on this demurrer, the plaintiff is entitled to judgment. To put into force the process of the law maliciously, and without any reasonable or probable cause, is wrongful; and if thereby, another is prejudiced in property or person, there is that conjunction of injury and loss, which is the foundation of an action on the case. Process of execution on a judgment, seeking to obtain satisfaction for the sum recovered, is *prima facie* lawful, and the creditor cannot be rendered liable to an action, the debtor merely alleging and proving that the judgment had been partly satisfied, and that execution was sued out for a larger sum than remained due upon the judgment. Without malice, and the want of probable cause, the only remedy for the judgment debtor is to apply to the court or a judge, that he may be discharged, and that satisfaction may be entered up on payment of the balance justly due. But it would not be creditable to our jurisprudence, if the debtor had no remedy by action where his person or his goods have been taken in execution for a larger sum than remained due on the judgment, this having been done by the creditor maliciously, and without reasonable or probable cause, namely, the creditor well knowing that the sum for which execution is sued out, is excessive, and his motive being to oppress and

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injure the debtor. The court, or judge to whom a summary application is made for the debtor's liberation, can give no redress beyond putting an end to the process of execution on payment of the sum due, although, by the excess, the debtor may have suffered long imprisonment, and have been entirely ruined in his circumstances.

It has been argued, that when the process of execution is a writ of *capias ad satisfaciendum*, the action will not lie, because the sheriff is merely commanded to take the body of the debtor to satisfy the sum recovered by the judgment; that, where the debtor's body may be lawfully taken, the sum indorsed upon the warrant is immaterial; and that, as the sheriff has no authority by the writ to liberate the debtor on receiving from him the whole sum recovered, or any part of it, in point of law no damage can be considered as having accrued to the debtor. But it is obvious to common sense, that the debtor may be grievously damnified by reason of the execution under a *ca. sa.* being for the full amount of the sum recovered by the judgment, when only a very small sum is due: his imprisonment is thereby likely to be greatly prolonged; and, though by the mere force of the writ, the sheriff is not authorized to receive the money, to levy which is the real object of the execution, it is well known, and may be capable of proof; that, in practice, the attorney for the judgment creditor may name a special bailiff to whom the warrant is to be directed, and that he is authorized to discharge the debtor on payment of the sum indorsed on the warrant to be levied, with poundage, and other expenses. At any rate, it is quite clear that, by a declaration on the warrant that the whole sum recovered is to be levied, although the greatest part of it has been paid, the debtor must be greatly embarrassed and delayed in raising the small balance remaining due, and in applying for his discharge.

There appears to be no authority amounting to an express decision that such an action is maintainable; but we think there is a strong indication by the majority of the judges who took part in the decisions of *Wentworth v. Bullen*, 9 B. & Cr. 840; *Saxon v. Castle*, 6 Ad. & El., 654, and *De Medina v. Grove*, in error, 10 Q. B. 172, that with an allegation of malice, and want of reasonable and probable cause, such an action is maintainable, although not without that allegation. In the last case, Wilde, C. J., does say, (10 Q. B. 177,) "The plaintiff here might have applied, if the state of facts justified the application, either, before the arrest, to have satisfaction entered up, or, after the arrest, to be discharged. It might, therefore, be a question whether, even with all proper averments on the record, the proper remedy would be by action. For, it might be contended, that what is complained of by the plaintiff, was mere irregularity." With great respect, we do not think that there is any irregularity in such a proceeding, the *ca. sa.* and warrant following the judgment; but, if there be malice and want of reasonable or probable cause, we do not, for this purpose, see the difference between an arrest for an excessive sum on *mesne process*, and such an arrest in execution. The increased difficulty in obtaining a discharge, may be as great a prejudice in one case, as finding bail for a larger sum, in the other.

If the action will lie, we are now to see whether in the present declaration, the wrong and the damage are sufficiently alleged. The plaintiff, after clearly showing that 100*l.* of the 115*l.* 2*s.*, for which the judgment was recovered, had been satisfied, goes on to allege that "the defendant falsely, maliciously, and without any reasonable or probable cause, caused and procured the sheriffs to make and grant their warrant upon the said writ to the bailiffs, commanding them to take the now plaintiff, and him safely keep, &c., to satisfy the now defendant the said sum of 115*l.* 2*s.*, &c., which said warrant was then indorsed with a direction to the bailiffs to levy such sum of 115*l.* 2*s.*; and, thereupon, the now defendant falsely and maliciously, and without any reasonable or probable cause, caused and procured the said warrant to be delivered to such bailiffs, and falsely and maliciously, and without any reasonable or probable cause, caused and procured the said bailiffs to arrest and take the plaintiff by his body upon the said warrant, to satisfy the defendant the said sum of 115*l.* 2*s.* so pretended to be then due to him as aforesaid." It is said that there is no allegation that the defendant indorsed the warrant to levy the full sum of 115*l.* 2*s.*, or gave any special directions to the sheriff; but the indorsement was a plain assertion that the whole sum remained due, and that the object of the execution was to compel payment of the whole sum; and the making of the warrant, the indorsement, and the arrest, are all alleged to have been caused by the defendant maliciously, and without reasonable or probable cause.

Objection is next taken, that there is no sufficient allegation of damage; but the plaintiff goes on to allege that "he was accordingly taken and imprisoned on such warrant, and lodged in jail, and there kept and detained four weeks, until he could procure his discharge from such custody, by applying to one of the judges of this court, who made an order that he should be discharged out of custody; and that, by means of the premises, he not only was prevented from attending to his affairs and business, and was injured in his credit and character, but also by means of the premises, he was put to and incurred great costs and expenses in and about procuring his liberation and release, from the said imprisonment." It is said that it might have been all the same if he had been arrested, as he lawfully might have been, merely to satisfy the balance of 15*l.* 2*s.* But he alleges, and undertakes to prove, that the long imprisonment was caused by the excessive sum being marked on the warrant to be levied, and that what he suffered, and the expense he incurred, arose "by means of the premises," namely, the defendant having so maliciously, and without reasonable or probable cause, caused the warrant to be granted to the bailiffs, indorsed with the direction to the bailiffs to levy the full sum of 115*l.* 2*s.*, and having caused him to be arrested to satisfy that sum. Therefore, it seems to us that he has sufficiently shown what he says he has suffered with the wrong, and that there ought to be judgment for the plaintiff.

Judgment for the plaintiff.

Regina v. Sharpley.

REGINA *v.* SHARPLEY.

June 10, 1854.

*Union of Parishes for the Maintenance of their Poor — Usage —
Reputed Parish — Two Rectories — 43 Eliz. c. 2.*

In the district of M. St. M. and M. St. P., there had always been one rate for maintaining the poor and repairing the roads, one set of overseers and of surveyors of the highways, and one constable; but there was evidence that there had formerly been two churches and two rectories, and that for some ecclesiastical purposes the district had been treated as two parishes. Upon appeal from a poor-rate made for the parish of M., a special case was stated, setting forth these and other facts, and giving the court power to draw such inferences from them as a jury might:—

Held, that the evidence showed that the district was a reputed parish at the time of the passing of statute 43 Eliz. c. 2, and therefore, was to be treated as one parish, as respects the maintenance of its poor.

A RATE OF assessment was made on the 17th April, 1854, by the church-wardens and overseers of the poor of the parish of Mablethorpe, and allowed by two justices of the peace, for the parts of Lindsey and county of Lincoln. Notice of appeal to the next Quarter Sessions for the said parts and county, was duly given, by Roger Sharpley, an occupier of land, in the parish of Mablethorpe, against the said rate; and the parties to the appeal thereupon, by consent, and by order of a judge, stated a special case for the opinion of the court, of which the following were the material parts: The ground of appeal against the rate is, that the alleged parish of Mablethorpe, in truth, contains within itself, and consists of, two separate parishes, namely, the parish of Mablethorpe St. Mary, and the parish of Mablethorpe St. Peter, each of which ought to maintain its own poor separately, and to appoint separate overseers of the poor, and to levy separate rates for their relief. The respondents contend, that, long before and at the time of passing of the 43 Eliz. c. 2, Mablethorpe was either actually or by reputation a parish, and was, therefore, entitled to have overseers appointed for it, and to maintain the whole of its poor, whether resident in one part of the parish or another, from one common fund. Neither of the alleged parishes of Mablethorpe St. Mary, and Mablethorpe St. Peter, so far as evidence can be procured, has ever maintained its poor separately, but one rate has always been made for the whole of the alleged parish of Mablethorpe, and the poor of the alleged parishes of St. Mary and St. Peter, have been jointly and indiscriminately relieved out of such rate, as one common fund, ever since the passing of the 43 Eliz. c. 2. There is no evidence tending to show, that at any time the alleged parishes of St. Mary and St. Peter ever separately appointed overseers, or levied rates for the relief of the poor. Two overseers have yearly been appointed for the whole of the alleged parish of Mablethorpe. The district, containing both, St. Mary and St. Peter, has usually been called in such rates, "the parish of Mablethorpe;" but the rate

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for 1777 purports to be made for "the town of Mablethorpe." The church-wardens of the church of St. Mary, have acted as overseers of the poor of the whole of Mablethorpe. The constable's accounts, in the parish chest of Mablethorpe St. Mary, commencing in the year 1706, describe that officer as constable of the town of Mablethorpe. The roads of St. Mary and St. Peter have always been maintained, as far as evidence goes, by one rate, made for the parish of Mablethorpe, as in the case of the poor-rate; and the surveyors of the highways have always been selected indiscriminately from the inhabitants of St. Mary and St. Peter, and appointed by the justices to serve the office of surveyors of the highways for the whole of the alleged parish of Mablethorpe, including both districts. A few certificates of settlement and bastardy bonds yet exist in the parish church of Mablethorpe St. Mary, given to the overseers of the parish of Mablethorpe; the oldest is dated the 26th June, 1711. In all county records, which only go back about 100 years, preserved in the office of the clerk of the peace, such as jurors' lists, county rates, &c., there is no mention of any parish, but that of Mablethorpe alone. In modern indictments, it is the same. Mablethorpe St. Mary and Mablethorpe St. Peter were, by order of the poor-law commissioners, bearing date the 18th March, 1837, when the Louth Union was constituted, included in the Louth Union, and described in the margin thus: "36. Mablethorpe St. Mary and St. Peter;" and one guardian only has been appointed and acted for both. This order has always been acquiesced in by the inhabitants of both. Mablethorpe St. Mary contains: 1,780 acres of land, 34 houses, and a population of about 261. Mablethorpe St. Peter contains: 1,004 acres, 14 houses, and a population of about 260. In the *Calendarium Inquisitionum post Mortem*, in the reign of Edward I., are these entries: "Henr. de Saltfleteby Malberthorpe terr. de Philip de Kyme tenet in Malberthorpe, 14 feod." And, in the reign of Edward II., there are three entries of a like nature, where Mablethorpe is named as before, without distinction of St. Mary or St. Peter. In the taxation of Pope Nicholas, under the head, "Decanatus de Calsworth," appears, "Ecclesia de Mablethorpe S. Petri, 4*l.* 6*s.* 8*d.*: Ecclesia de Mablethorpe S. Maria, 8*l.*" In the *Inquisitiones Nonarum*, 1341, under the head, "Decanatus de Calsworth," is an entry, headed "Malb'thorp," to the following effect: The two churches are taxed conjointly, (*conjunctim*.) The same assessors render account for 13*l.* received from the ninth of the sheaves, fleeces, and lambs of the parish of Malb'thorp, the two churches whereof are taxed (*parochiæ de Malberthorp cujus quidem Ecclesiæ taxantur*) at 18*½* marks, as appears by the inquisition taken by the oath of Alan Ward, &c., and others their fellows of the parish aforesaid, jurors, (*et aliorum sociorum suorum parochiæ prædictæ juratorum*.) Of the two churches of the alleged parish of Mablethorpe, so mentioned in the *Inquisitiones Nonarum*, one was destroyed before the year 1526, and has not been rebuilt, although Lord Willoughby d'Eresby, the patron of that church, by his will dated in that year, directed as follows: "Item — I will that my executors shall in as conveyent and shorte tyme as they possible canne, per-

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chas as muche lande as shall be necessary for the buylding and setting upp of a new churche and churchyard, to be made and holie buylded at my cost and charge, to the value of cc marks, within the towne of Mablethorpe, in the countie of Lincoln, and that to be paid by my executors of the issues, revenues, and profits of all my said manours, lands, and tenements; those I have appointed for the execution of this my last will, in consideracion that I myselfe take to my own use all such leade as the said churche was coveryd with, and of which churche I am patron." The Valor Ecclesiasticus, 26 Hen. 8, under the general heading "Malbthorpe," contains a separate valuation of the two rectories of St. Peter and St. Mary. The several institutions to these rectories, St. Peter and St. Mary, are separately recorded in the book of institutions remaining in the registry of the Bishop of Lincoln. On the 27th January, 1491, Edward Strangways was instituted to the rectory of Mablethorpe St. Mary, and on the 30th November, in the same year, Thomas Kirkman was instituted to the rectory of Mablethorpe St. Peter. From this period the institutions to the rectory of Mablethorpe St. Mary are continued to the year 1661, after which time it was legally united to the adjoining rectory of Staine; and, from the year 1687, down to the institution of the present incumbent, the Rev. Thomas Lovick Cooper, on the 9th August, 1831, the benefice to which the several rectors were instituted, is described as Mablethorpe St. Mary-with-Staine. The institutions to the rectory of Mablethorpe St. Peter are continued in the same form, from the year 1491, down to the year 1746; but, in the institution of the next succeeding rector, in the year 1761, the benefice is described, as Theddlethorpe St. Helen with Mablethorpe St. Peter, and is so continued until the institution, on the 6th December, 1820, of the Rev. Payne Edmonds, the present incumbent. (The case then set out portions of a deed of union, executed by the Bishop of Lincoln, in 1737, between the parishes of Theddlethorpe St. Helen and Mablethorpe St. Peter.) In these books of institutions, both Mablethorpe St. Peter and Mablethorpe St. Mary, respectively, are frequently described as parishes, and frequently as Mablethorpe St. Mary, or St. Peter, omitting the word "parish." The inhabitants of the alleged parish of Mablethorpe St. Peter, as far as evidence exists, have not contributed towards the repair of the church, situate in the alleged parish of Mablethorpe St. Mary, but the church-rate, which has occasionally been made for the repair of such church, has been assessed on the occupiers of land, wholly situated in the St. Mary's part of the parish, and on such occupiers alone. The tithes of the rectory of Mablethorpe St. Peter have been commuted by the rector of Theddlethorpe St. Helen, with Mablethorpe St. Peter; the tithes of Mablethorpe St. Mary have, also, in the like manner been commuted, and are paid to the rector of Mablethorpe St. Mary-with-Staine. There are no parochial registers existing of earlier date than the year 1650, the oldest of which is deposited in the church of St. Mary, being intituled, "A Register of all the Christenings, Marriages, and Burials within the Parishes of Mablethorpe St. Mary and St. Peter, from the 26th March, 1650." The modern register, now in

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use, is headed, "Mablethorpe St. Mary and St. Peter, in the diocese of Lincoln, 1810." The entries in these registers frequently make a distinction between the two places, and describe the parties as of the parish of Mablethorpe St. Mary, or the parish Mablethorpe St. Peter with Theddlethorpe St. Helen, as the case may be. Two church-wardens were from 1601 down to 1712 appointed for Mablethorpe St. Mary, but only one has been appointed for St. Peter, and, since 1834, none for St. Peter. The question for the opinion of the court is, whether, upon the facts above mentioned, Mablethorpe St. Mary and Mablethorpe St. Peter ought by law to appoint separate overseers, maintain and manage their own poor separately, and have separate rates and assessments levied on them for that purpose. It is agreed by the parties, that the court shall have all the power to draw inferences and conclusions from the facts above stated, which a jury upon the trial of a civil action would have. If the court shall be of opinion that they ought by law to appoint separate overseers, and maintain their poor separately, then this rate is to be quashed. If the court should be of a contrary opinion, the rate is to be confirmed. The case was argued by

Pashley, (with him was *Flowers*,) for the respondents. Admitting that St. Mary and St. Peter were two parishes for ecclesiastical purposes, they constitute one parish for the purpose of maintaining their poor.

[*ERLE, J.* I never remember two parishes becoming, by user, consolidated into one; and I very much doubt whether two parishes could be so consolidated; though parts of a parish may, by sect. 21 of stat. 13 & 14 Car. 2, c. 12, become, for the purposes of the poor law, a separate parish.]

The principle is the same whether there are two parishes, or two parts of a parish. The leading consideration is, whether the parish was considered as one, and treated as one, when stat. 43 Eliz. c. 2, passed. *Price v. Quarrel*, 12 Ad. & El. 784, 788, 789; *Rex v. Newell*, 4 T. R. 266; *Regina v. Clayton*, 13 Q. B. 354. In Dalton's Justice, tit. "Poor," 165, ed. 1742, it is said: "If there be an ancient parish, and an ancient village within that parish, which village had an ancient church, and those within that village have had parochial rights, have chosen church-wardens and overseers of the poor, and have been separately taxed ever since the 43 Eliz. c. 2, for the relief of the poor within that village, this is a parish within 43 Eliz. c. 2, and taxes may be made and levied within themselves. And all this was resolved in a cause between Hilton and Pawle, upon a special verdict between the parish of Hinkley, in the county of Leicester, and the village of Stoke Goldingham, within that parish. Cro. Car. 92. And the like was also resolved (Trin., 10 Car. 1) between Nichols and Walker, between the parish of Hatfield and the village of Tatridge. 1 Jones, 355; Cro. Car. 394." The existence of two churches in one parish may be accounted for by the incumbents being portionists.

[*LORD CAMPBELL, C. J.* If there was a religious house within

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the parish, it would have been a place of worship within the parish, and that would account for each building being called a church, and, by degrees, each district a parish.]

Sect. 22 of stat. 7 & 8 Vict. c. 101, enacts, that, "after the passing of that act, it shall not be lawful to appoint separate overseers for any township or village, or other place, for which, before the passing of that act, separate overseers had not been lawfully appointed."

Boden, contra. If St. Mary and St. Peter were, in fact, two separate parishes at the time of the passing of stat. 43 Eliz. c. 2, they are so still, and each is bound to make a rate for the maintainance of its own poor. There is no authority for two parishes becoming united together by user. In all the cases there were two districts, not two parishes; and the question was, whether they were a reputed parish at the time of the passing of stat. 43 Eliz. c. 2. *Hilton v. Pawle*, Cro. Car. 92, which was like *Nichols v. Walker*, Ib. 394.

[LORD CAMPBELL, C. J. The word "parish" in stat. 43 Eliz. c. 2, must mean what had then the reputation of being a parish. If we should come to the conclusion that at that time the districts of St. Mary and St. Peter had the reputation of being a parish, would not that be enough to justify the rate, though at some antecedent time there were two parishes?]

Ecclesiastically, they have been separate parishes. If all the inhabitants of two parishes concurred, they might make one highway rate as well as one poor-rate.

[LORD CAMPBELL, C. J. Long acquiescence in the payment of rates, is strong evidence for us, as a jury, that the two districts are one parish, especially where there is also an inequality in the quantity of land in the two.]

The headings on the rolls, of the *Inquisitiones Nonarum*, and the *Valor Ecclesiasticus*, treat them as two rectories; and that shows that they must have been two parishes.

Pashley, in reply. In *Regina v. Clayton*, 13 Q. B. 354, 362, it is said: "They [the cases] show that where the ecclesiastical separation is complete, as it certainly is in the present case, with the exception of tithes, the districts may be separate parishes, or reputed parishes, but not that they necessarily must be." [He also cited *Nichols v. Walker*, 2 Roll. Ab. 560, pl. 1.]

LORD CAMPBELL, C. J. I am of opinion that this rate should be confirmed, and there is no reason for disturbing the usage which has prevailed so long in this parish. The evidence is conflicting as to whether there ever were two parishes in this district. There is strong evidence in the facts and documents which have been referred to, that, from time immemorial, there has been only one parish. The fact of the repair of the highways having been by one rate, I can only account for on the supposition of there being one parish. There is also evidence of considerable weight that there were two

parishes; but it is enough for the confirmation of the rate, if they were reputed and acted as one parish at the time of the passing of stat. 43 Eliz. c. 2. The statute meant to apply to districts which at that time acted as one parish, without throwing on the inhabitants the necessity of ascertaining whether the district had become strictly a legal parish; and to districts which were then reputed parishes, where the inhabitants could say, "we are brother parishioners." That is the result of the cases, in which I entirely concur. Then, upon the facts stated, the evidence is almost irresistible. I have not the smallest hesitation in coming to the conclusion, that in the time of Queen Elizabeth this district was treated as one parish, for all secular purposes; there was one rate, one set of overseers, one constable, and it has been called one parish. That is evidence which should convince us that at that time it was a reputed parish, the usage being contemporaneous with the statute. Therefore, according to the just construction of the statute, it is still to be treated as one, and ought still to have one rate, and one set of overseers.

ERLE, J. I have also come to the same conclusion. Upon an examination of the evidence stated in this case, I can see no clear proof that they ever were two distinct parishes. Two different rectories are spoken of, but in some ancient documents the two parishes are blended in one. We are dealing with the question, whether for secular purposes they are to be considered as one parish; and, as far as living memory goes, without exception, the districts have been uniformly treated as one, and have acted as one for secular purposes: therefore I draw the conclusion that they ought to maintain their poor jointly.

CROMPTON, J. I am of the same opinion. It is not necessary for us to say absolutely whether there ever were two parishes, because this district must be taken to be a parish for the purposes of stat. 43 Eliz. c. 2. We are put in the position of a jury, and there is enough to support the ancient usage, and to justify a jury in finding that there was only one parish. After the length of time which has elapsed, there are strong reasons, besides usage, for this conclusion. I do not understand how the highways could be maintained by a joint rate if Mablethorpe was not one parish. In one of the ancient documents the place is called one parish, with two churches, which would explain how they came to be treated as two parishes, for some ecclesiastical purposes. There is evidence, therefore, on both sides, but the preponderance is, I think, in favor of the respondents. Further: I am inclined to think that, even if they were at some ancient time two parishes, it is enough if they were treated as one parish at the time of the passing of stat. 43 Eliz. c. 2. That appears to be so on the authority of the cases, and that was the construction put upon the statute near the time of its passing. Then, does it make any difference that half a parish is added to another parish? Mr. Boden says that the statute only allows a rate for a parish; but that applies to one as well as the other. It makes no difference whether a part

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of a parish, or the whole of a parish, is taken and added to another parish. There is no doubt that, by user and repute, this district was one parish, in the time of Queen Elizabeth.

Judgment for respondents.

THE LINNEAN SOCIETY OF LONDON, *Appellants*, v. THE CHURCH-
WARDENS AND OVERSEERS OF ST. ANN, WESTMINSTER, *Respondents*.

May 31, 1854.

*Poor-rate — "Linnean Society" — Purposes of Science exclusively —
Annual Voluntary Contributions — Librarian and Housekeeper —
Porter.*

The Linnean Society, which was incorporated by royal charter, and was instituted for the purpose of science exclusively, was supported in part by annual contributions of the fellows, who, before their admission, signed an obligation for the payment of such contributions; and, in case of default in payment thereof, the obligation might be put in suit for the recovery thereof. The society were lessees of contiguous premises, 32 Soho-square, and 17 Dean-street, which had formerly been one house, and underlet 17 Dean-street, and five rooms in Soho-square to B. The other part of the premises in Soho-square was occupied for the purposes of the society, the librarian and housekeeper occupying as his dwelling, two rooms, and the porter also dwelling in the house, the permissive use of the rooms in which they dwelt being taken into account, in fixing the amount of salary. On appeal against a poor-rate, assessed on the society in respect of 32 Soho-square:—

Held, first, that it was "a society supported in part by annual voluntary contributions," within statute 6 & 7 Vict. c. 36, s. 1.

Secondly, that it was entitled to exemption from rating in respect of the rooms in 32 Soho-square, in the occupation of the librarian and house-keeper, and the porter.

Thirdly, that B was liable to be rated for the rooms in 32 Soho-square underlet to him.

On the 24th March, 1853, a rate for the relief of the poor was made and allowed by a magistrate acting for the liberty of Westminster for the above parish, in which the Linnean Society was assessed, for the house No. 32, Soho-square, in the manner stated opposite No. 184, in the following extract from the rate:—

No.	Name of Occupier.	Description of Property rated.	Name or Situation of Property.	Gross Estimated Rental.	Ratable Value.	Rate at 9d. in the Pound.
184	Linnean Society.	House.	32 Soho-square.	£ 124 0 0	£ 4 13 0
591	Robert Brown.	House.	17 Dean-street.	60 0 0	2 5 0

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The Linnean Society having objected to this rate, the following case was submitted to the Court of Queen's Bench under the provisions of statute 12 & 13 Vict. c. 45: This society claims exemption from this rate on the ground that it comes within the meaning of statute 6 & 7 Vict. c. 36. The society was incorporated by a royal charter, dated the 26th March, 1802, for the purposes therein mentioned, and has been conducted in conformity with the provisions of that charter, unless the facts stated in this case are inconsistent with such purposes. The charter and the by-laws are to be taken as part of the case. The society was duly certified by J. T. Pratt, Esq., the barrister authorized for that purpose, to be entitled to the benefit of statute 6 & 7 Vict. c. 36. The by-laws of the society provide that it shall not make any gift, division, or bonus in money unto, or between any of its members, and have also been duly certified. The officers of the society are a president, a treasurer, a secretary, a clerk, librarian, and housekeeper, and a porter. The business of the society is managed by the president and such fellows as are members of the council, in the manner prescribed in chapter 14 of the by-laws; and meetings are held periodically, at which papers regarding natural history are read and discussed, and such of them as it is the sense of a standing committee of the society should be published are printed in their transactions. Between 300 and 400 copies of the transactions are circulated amongst the fellows, others are sold to the public, and about fifty other copies are gratuitously distributed amongst other institutions both at home and abroad. The printing, publication, and sale of these transactions do not defray their own expenses, and the only object of the society in so selling is to reduce the expenses incurred by them in such printing, publication, and sale. Some of the fellows pay annual contributions, others pay the sum appointed in lieu of annual contributions. The society is partly supported by these contributions. No contribution or payment of any kind is made by honorary members, foreign members, or associates. The fellows are entitled to have gratis a copy of all those transactions which are published subsequently to their having paid the first annual subscription, or the sum in lieu of all annual contributions. The transactions are published by Longman and Co., the booksellers, who sell them to the public by commission at a fixed price, making to the purchaser, if he be a bookseller, the usual allowance of 25% per cent. Other copies of these publications are kept at the society's house for sale, where they may be purchased by the public on the same terms as if bought at Longman and Co.'s; but all those fellows who may wish to have those volumes which may have been published before they became subscribers, are allowed the booksellers' privilege of purchasing them at a reduction of 25% per cent. The only object in making an allowance to fellows on the purchase of volumes or parts of the transactions is to enable them to purchase at a reduced price those volumes or parts which were published before their admission as fellows. The clerk, librarian, and housekeeper of the society occupies as his dwelling two rooms within the house No. 32, Soho-square, and wholly lives there. The library, museum, and other matters of the society

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under the care of this officer are very valuable. The porter of the society also dwells in the house No. 32; and it is admitted by the parish officers that it was convenient and reasonably necessary that the porter should so dwell there. The clerk, librarian, and house-keeper, and the porter, respectively receive a salary, or wages for their services, and pay no rent for the use of the rooms in which they dwell, the value of the permissive use of such rooms being, however, taken into account in fixing the amount of salary. The remainder of the apartments is entirely appropriated to a museum, library, and other rooms suitable to and necessary for the purposes of the society, and no part of them is unoccupied. The premises included in the rate were originally one house only, and formed the town mansion of the late Sir Joseph Banks, and were rated as one tenement, namely, as No. 32 Soho-square, in one sum of 184*l.* per annum. Sir Joseph's principal apartments were in the part fronting Soho-square, but the whole of that part of the house which was in Dean-street was also occupied by him, part of it consisting of his library, and the rest of it of apartments appropriated for the use of different portions of his family. Sir Joseph Banks, by his will, left the residue of a term which he had in this property to Mr. Robert Brown. Soon after his death, Mr. Robert Brown underlet to the Linnean Society, not the whole house, but a certain portion of it, fronting Soho-square, and reserved to himself the remainder, which he occupied. In 1851, Mr. Brown's lease expired; and at the latter end of that year the society took from the freeholder a lease for twenty-one years from Michaelmas, 1851, of the whole property included in the respective assessments on the society and Mr. Brown, and which had been previously held by Mr. Brown, and on the 6th May, 1851, by the lease, (which, with the plan drawn in the margin thereof, was to form part of the case,) underlet to Mr. Brown for twenty-one years, wanting two days, from Michaelmas, 1851, the same premises which he had reserved to himself when he underlet to the society — firstly, "all that messuage or tenement, dwelling-house, and private museum, outbuildings, part of a yard, area, stairs to basement, inclosed passage, and other the premises colored red, yellow, and green in the plan, &c., which said premises are on the east of Dean-street, in the parish of St. Ann, Soho, in the county of Middlesex, numbered 17 in the same street, and are situate at the rear of a certain messuage, or dwelling-house, and hereinafter mentioned, situate and being at the southwest angle of Soho-square, in the said parish of St. Ann, Soho, and No. 32 in the same square;" and secondly, "all such rooms and accommodations in the said messuage, No. 32 in Soho-square, as are hereinbefore mentioned — two rooms on the ground floor, marked A and B on the plan; one room on the second floor, called the northern back room, the windows of which face the west; two small back rooms on the attic floor, the windows of which face to the west, together with the use, in common with the said Linnean Society, their successors and assigns, of the hall, staircase, and passages, forming part of the said dwelling-house No. 32, leading to the said rooms and premises demised, for the purpose of passing and repassing at all times to and from the

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same." The premises, No. 17 Dean-street, firstly above demised, are wholly and are alone included in the assessment on Mr. Brown, above set forth. Under such underlease, Mr. Brown has ever since occupied and enjoyed the premises and rights so demised and granted to him. If the court should be of opinion that the Linnean Society of London is not exempt from the rate under the 6 & 7 Vict. c. 36, the rating of 124*l.* is to stand as confirmed against them. If the court should be of opinion that such exemption exists as to all the property except the rooms used as residences by the clerk and by the porter as aforesaid, then the rate on the society is to be reduced to the sum of 24*l.* ratable value in respect of such rooms only; but if the court should be of opinion that there is a complete exemption from liability to poor-rate in respect of all such premises, then the rate is to be amended by striking out the sum of 124*l.* inserted as ratable value in the said assessment on the Linnean Society, the parties thereby agreeing that a judgment, in conformity with the decision of the court, and for such costs as the court should adjudge, might be entered on motion by either party at the general quarter sessions of the peace for the county of Middlesex.¹

¹ The charter, after reciting that several persons were "desirous of forming a society for the cultivation of the science of natural history, in all its branches, and more especially, of the natural history of Great Britain and Ireland, and having subscribed considerable sums of money for that purpose," had prayed for a royal charter of incorporation, "for the purposes aforesaid," provided for the incorporation of the society, from a desire to "promote every kind of improvement in the arts and sciences," and for the appointment of officers, and gave power to the council to make by-laws for the government of the society. The more material by-laws were as follows: "No person elected shall be admitted a fellow of the society, until he shall have paid his admission fee, and signed the usual obligation for the payment of yearly contributions, or paid the sum appointed in lieu of such contributions.— Every person elected a fellow of the society, shall, before his admission, subscribe an obligation in the following words: 'We, who have hereunto subscribed, do hereby promise, each for himself, that we will endeavor to promote the good of the Linnean Society of London, and to pursue the ends for which the same was instituted; that we will be present at the meetings of the society as often as conveniently we can, especially, at the anniversary elections, and upon extraordinary occasions; and that we will observe the statutes, by-laws, and orders of the society: provided, that whensoever any of us, shall signify to the president, under his hand, that he desires to withdraw from the society, he shall be free from this obligation for the future;' and if any person shall refuse to subscribe the said obligation, the election of that person shall be void. — No person shall be deemed an actual fellow of the society, nor shall the name of any person be printed in the annual list of the fellows of the society, until such person shall have paid his admission fee, and signed the usual obligation for the payment of annual contributions, or paid the sum appointed in lieu of such contributions; and no such person shall have liberty to vote at any election, or meeting of the society, before he shall have been admitted as directed in the preceding section. — All fellows elected on or before the 24th May, 1802, who have already paid their admission fees, but have not paid the sum of ten guineas at one payment in lieu of all annual contributions, shall pay to the use of the society, the annual sum of one guinea, the first payment to become due on the 24th May, 1803: provided, however, that every such fellow, may, at any time, compound for all future annual payments, by paying the sum of ten guineas, including the annual guinea which may be due at the time such composition shall be paid. — All fellows who shall be elected after the 24th May, 1829, shall, before they be admitted, pay to the use of the society the sum of 6*l.* for their admission fee; and if any person refuse or fail to pay the said sum, his election shall be void, unless the same be remitted, in

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Pashley, (with him was *Huddleston*,) in support of the rate. Admitting that the society is instituted for the purposes of science exclusively — first, it is not supported by voluntary contributions. According to the charter and the by-laws, the members must have entered into an obligation to pay annual subscriptions, or they must have paid the sum fixed in lieu of annual contributions; and if a

whole or in part, by special order of the council. — Every fellow who shall be elected after the 24th May, 1829, shall, besides the admission fee, further contribute towards the funds of the society, previous to his admission, by paying the sum of 30*l.* in lieu of all future payments, or he shall sign an obligation for the regular payment of 3*l.* per annum to the society so long as he shall continue a fellow. — Every such fellow so elected may at any time compound for his future contributions by paying the sum of 30*l.* in one year, instead of the annual contribution for that year; in which case his obligation to make annual payments shall be void: provided, nevertheless, that in case any fellow be not usually resident within the United Kingdom of Great Britain and Ireland, such person shall not be permitted to enter into an obligation for the payment of annual contributions, but shall, within two months after his election, or such other time as the council shall permit, and before he be admitted, pay or cause to be paid into the hands of the treasurer, the sum of 30*l.*, in lieu of such contributions. — All yearly contributions shall be considered due and payable at each anniversary meeting for the year preceding; but no fellow elected on or before the 1st of February, in any year, shall pay the annual contribution at the anniversary meeting, which shall immediately follow his election. — If any fellow paying yearly contributions, should fail to bring or send in the same to the treasurer within twelve months after each anniversary meeting, unless the said payment be remitted, in whole or in part, by special order of the council, his obligation shall be put in suit, for the recovery thereof, and he shall be liable to ejection from the society, upon which the council shall proceed as they may see cause. — The number of associates shall be indefinite, but shall include only such persons as usually reside in the British dominions. — Upon the death or voluntary withdrawing of any fellow, honorary member, foreign member, or associate, the secretary shall note such death or withdrawing in the printed list of that year, and the death or withdrawing of any member shall be entered upon the minutes of the society, at the then next anniversary meeting. — No fellow shall be understood to have withdrawn himself from the society, until he shall have signified such his intention by letter, under his hand, addressed to the president; and if such letter be not left at the apartments of the society, between the 24th May in any year and the 1st February next following, the contribution of such fellow shall be understood to be continued for the whole of the year, in which he shall have withdrawn himself. — The person who shall be chosen to any one or to all of those offices to which salaries, or emoluments are to be annexed, shall either not be a fellow of the society, or, if a fellow, shall cease to be so upon his election to and acceptance of any such office, as no fellow of the society is, or shall be capable of holding any place, office, or appointment under the society to which any salary, profit, or emolument is or shall be annexed. He shall be competently skilled in languages and natural knowledge, and able to write a fair and legible hand. The librarian shall also have the charge of the society's museum of natural history, to view which he is to admit the members of the society, and such other persons as shall be introduced by fellows, at such times as the council shall direct. He shall not, without leave of the council, permit any article whatever to be taken out of the society's collection; and he shall enter into a catalogue, all articles presented to, or bought by the society. — The honorary members, foreign members, and associates shall have free communication with the society at their general meetings. — Each fellow, honorary member, and associate may introduce a stranger at every general meeting of the society, on delivering his name to the president, and the name of every stranger so introduced shall be entered in the minute-book, together with the name of the member who shall introduce him, and who is to be accountable for his conduct during his presence at the meeting. — The business of the society at their general meeting, shall be to read and hear letters, reports, and other papers on subjects of natural history, and also to view such specimens of the productions of nature as shall be presented."

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member makes default, he may be sued. The voluntariness of the act in entering into the obligation, does not make the future payments voluntary. The contribution is not voluntary, if it is not in the power of the party to withhold it at the time when he makes it.

[LORD CAMPBELL, C. J. The phrase "voluntary contributions," in statute 6 & 7 Vict. c. 36, s. 1, must be understood in its popular sense. We speak of a hospital as supported by voluntary contributions, when those contributions are made by annual subscribers or life governors. Can it make a difference, whether the subscription is paid down without a promise to pay it, or is paid on a promise to pay it for ten years? And, in this case, there is a power to withdraw from the society on certain conditions.]

This point was not determined in *The Russell Institution v. The Vestrymen of St. Giles-in-the-Fields and St. George, Bloomsbury*, 18 Jur. 597; s. c. 24 Eng. Rep. 126. Secondly, part of the premises is underlet to a tenant who is not rated for it, and, therefore, the society is not exempt. *Purvis v. Traill*, 3 Exch. 344; *The Earl of Clarendon v. The Rector, &c., of St. James's*, 10 C. B. 806; s. c. 5 Eng. Rep. 393. Thirdly, part of the premises are occupied by the keeper of the library and museum, and by the porter, and their occupation is taken into account in fixing the amount of their salaries.

Cowling, (with him was *Thring*,) contra, was not called upon.

LORD CAMPBELL, C. J. I am of opinion that this society is entitled to be exempted from rating, under statute 6 & 7 Vict. c. 36, s. 1. It is a society established for purposes of science exclusively: therefore, one of the conditions of the statutory exemption is fulfilled. This case is very different from some which we have had before us, where a musical club, established by members for their own amusement, claimed exemption, as in *Regina v. Brandt*, 16 Q. B. 462; s. c. 3 Eng. Rep. 323; or where a similar claim was made by persons, resorting to rooms for reading newspapers, and for their own recreation and amusement, as in *Regina v. Gaskell*, 16 Q. B. 472; s. c. 8 Eng. Rep. 298; and *The Russell Institution v. The Vestrymen of St. Giles-in-the-Fields and St. George, Bloomsbury*, 18 Jur. 597; s. c. 24 Eng. Rep. 126.

The next thing to be considered is, whether the society is maintained, in part, by voluntary contributions. I am clearly of opinion that it is, because, though the contributions, made by the fellows or members of the society, are made under an obligation to pay the amount, which obligation continues so long as they remain fellows or members, still, their payments are voluntary, because they are made by virtue of engagements, which were originally entered into voluntarily. Persons voluntarily become fellows or members, and they are at liberty to withdraw when they please; (though I do not say, that if they were not so at liberty, it would make any difference;) and, therefore, while they think fit to contribute, the contributions are voluntary within the meaning of statute 6 & 7 Vict. c. 36, s. 1; and, further, the contributions are made without any personal advantage

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resulting to those who make them. Therefore, this is quite different from *The Russell Institution v. The Vestrymen of St. Giles-in-the-Fields, and St. George, Bloomsbury*, 18 Jur. 597; s. c. 24 Eng. Rep. 126, where newspapers and various accommodations were provided for the members, which, peradventure, would prevent the contributions in that case from being considered voluntary. But, all that is done by this society, is for the purpose of science. Copies of the reports and papers, which have been read, are sent to members, but that is merely for the advancement of science; and copies are sold, but that is to give information respecting the proceedings of the society to the public.

As to the point on the underletting of part of the premises, if the members of the society made any use of that part of the premises, and not for the purposes of the society, the society would not be exempt in respect of that part. But, I consider Brown ratable in respect of the rooms underlet to and occupied by him, and that the society was not in the occupation of them, nor are they any part of the premises, in respect of which exemption is claimed. The society does not lose its immunity, because, not having occasion for these rooms, it underlets them.

The last point was on the occupation of the premises by the porter and the keeper of the museum. I assume, that their occupation is subsidiary to the institution, and necessary for the purposes of the society: then it is an occupation by the society, through the medium of the porter and the keeper of the museum, for the purposes of the society; and, therefore, does not deprive the society of its title to exemption.

I am, therefore, of opinion that the rate is wrong, so far as it rates the society for premises occupied by it.

ERLE, J.¹ I am also of opinion, that the rate should be quashed, because this society is clearly exempt by statute 6 & 7 Vict. c. 36, being instituted exclusively for the purposes of science, and supported, in part, by voluntary contributions.

Then, are there any special grounds for making it liable to be rated? It is said, that it is not supported by voluntary contributions, because the fellows are under a legal obligation to pay their subscription for the current year; but, I am of opinion that the annual subscription is in the nature of a gift, for the purposes of the society, and is not returned in the shape of a private benefit to the fellows; and it is voluntary, because, at the beginning of the year, and for some time after, a fellow has the option of withdrawing from the society, and ceasing to be liable to contribute. But, whether he withdraws or not, in either event it is voluntary within statute 6 & 7 Vict. c. 36, s. 1. That disposes of the first exceptional ground for rating the society.

As to the second exceptional ground, that the society has underlet

¹ COLERIDGE, J., was at the sittings at Guildhall.

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part of the premises, it is merely matter of fact. The two houses, in Soho-square and in Dean-street, belong to the same freeholder, and the society only wanting the house in Soho-square, they let the house in Dean-street and some of the rooms in the house in Soho-square, as often happens in the case of houses which are contiguous, and the part so let off was fastened up. For all purposes of rating, those rooms are part of the house in Dean-street; and the parish officers have a right to rate the occupier of the house in Dean-street for those rooms.

The third ground is, that the clerk, librarian, and housekeeper, and the porter, reside in the house which the society occupies; and the question is, whether their residence is subsidiary to the purposes for which the society was instituted. It is clear, that the society must have some person on the premises to take care of and guard the museum and library; and, therefore, that question must be answered in the affirmative.

CROMPTON, J. In the course of the argument, I have not been free from doubt as to the construction to be put upon the word "voluntary," in statute 6 & 7 Vict. c. 36, s. 1. But, I do not wish to put a narrow construction upon that expression in the statute; and I have not a sufficiently clear opinion to disagree from the conclusion, which the rest of the court have come to.

As to the rooms, which the society let to Brown, the case is within *Regina v. The Overseers of Manchester*, 16 Q. B. 449; s. c. 3 Eng. Rep. 314, which decided, that the letting of part of a building to tenants did not affect the exemption of the part occupied by the society; and that, I think, is a right decision. There is no distinction between letting off rooms of a house and letting the contiguous house.

With regard to the occupation of the porter, and of the clerk, librarian, and housekeeper, it is clearly ancillary to the institution, and necessary for the purposes of the society.

Cowling applied for costs.

LORD CAMPBELL, C. J. The case was left doubtful on one point; therefore, we give judgment for the appellants, without costs.

Judgment for appellants, without costs.

Regina v. The Inhabitants of Burgate.

REGINA v. THE INHABITANTS OF BURGATE.

May 31, 1854.

*Settlement by Estate — Devise — Direction to Sell — Executors —
Legal and Equitable Estate.*

M., by his will, devised a house and land to his wife for life, and "after my wife is deceased the same shall be sold within six months, and be equally divided between my six children; and, providing any of them should be dead, their father's or mother's share to be equally divided between their children, whereof I choose for executors or executrixes, A. M., my wife, and W. H., my son-in-law, whereof they shall be paid their reasonable expenses." Some of the grandchildren of the testator, issue of one of his deceased daughters, were minors at the time of his death. The pauper, one of the daughters of M., and her husband, occupied the house and land at the time of his death, in August, 1844, and until they were sold under the will, in April, 1845: —

Held, that the legal estate passed under the will to the children and grandchildren of M., and not to the executors; and that the pauper had such an estate as conferred a settlement.

On appeal, at the Epiphany General Quarter Sessions for the County of Suffolk, 1854, against an order of two justices for the removal of Ann Torbold, widow, and her three children, aged twelve, eight, and six years, respectively, from the parish of Mellis, to the parish of Burgate, both in the county of Suffolk, the sessions confirmed the order, subject to the opinion of this court, on the following case: William Torbold, the husband of the pauper, Ann Torbold, previously to his marriage with her, acquired a settlement in the appellant parish of Burgate, by hiring and service for a year, ending at Old Michaelmas, 1826; but the said Ann Torbold was the daughter, and one of the coheiresses of John Mullinger, late of the parish of Wortham, in the said county of Suffolk. At the time of her marriage with William Torbold, which took place in the month of June, 1829, she resided with her father in a house of his own; he was seised in his demesne in fee simple of this house, and of the premises thereunto belonging, and also of about an acre of land adjoining the same, and the whole was situate in the parish of Wortham. Upon the marriage of William and Ann Torbold, William Torbold came to reside with his wife and her father in the house in question, and all of them continued to reside together until the death of John Mullinger. He died on or about the 31st August, 1844, having first made and published his last will and testament in writing, duly executed and attested for passing real estate, in the following words: "Item: I give and bequeath to my wife, Ann Mullinger, my freehold estate, and all that appertain to it, during her natural life, lying in Blow Norton, in the county of Norfolk. Item: I also give to my wife my other freehold estate, and all that appertain to it, in Wortham, in the county of Suffolk, during her natural life. Item: I also give unto my wife all my live and dead stock, with goods and chattles, &c. Item: After

my wife is deceased, the same two freehold estates shall be sold within six months, and be equally divided between my six children; and, providing any of them should be dead, their father's or mother's share to be equally divided between their children, whereof I choose for executors, or executrixes, Ann Mullinger, my wife, and William Hogg, my son-in-law, whereof they shall be paid their reasonable expenses." Ann Mullinger, the wife of the testator, predeceased him, and died in or about the month of January, 1842. The only descendants of the said testator alive at his decease, were his daughter, the pauper, Ann Torbold; his daughter Mary Green, since deceased, but then living, married to Charles Green; and his grandchildren, some of whom at the time of the testator's death, were minors, being the lawful issue of his daughter, Susannah Hogg, then deceased, and William Hogg, her husband, the said Susannah Hogg having intermarried with the said William Hogg, on the 5th July, 1814, and having died in the month of March, 1829. The property of the testator, described in his will as his freehold estate lying in Wortham, in Suffolk, consisted of the house and premises, and land above mentioned. William Torbold and the pauper Ann Torbold, his wife, and his family, continued to reside and sleep in the said house, and occupied the said house and premises and land, upon the death of the testator, until the same was sold, under the provisions of the will, in the month of April, 1845; and on the sale, the said William Torbold and Ann, his wife, received one third part of the purchase-money. The pauper children, Ann Torbold, J. Torbold, and Susan Torbold, are the lawful issue of the marriage of William Torbold and the pauper Ann, his wife, and are of the ages of twelve, eight, and six years, respectively, and unemancipated. William Torbold died on or about the 3d January, 1852. Neither William Torbold, nor the pauper Ann Torbold, his wife, nor the children, ever resided at so great a distance as ten miles from the said parish of Wortham. The question for the opinion of the Court of Queen's Bench is, whether the facts stated show a settlement of the said Ann Torbold, the widow, in the parish of Wortham. If the Court of Queen's Bench shall be of opinion in the affirmative, then judgment is to be entered for the appellants, but, if not, for the respondents.

Palmer and Power, in support of the order of sessions. The right construction of the will is, that the bare legal estate descended to the coheiresses, with a power of sale in the executors.

[LORD CAMPBELL, C. J. If the estate passed to the heir at law, why should not he be the person to sell the property?]

By the clause, after the appointment of executors, "whereof they shall be paid their reasonable expenses," the estate is charged with paying the reasonable expenses of the executors in selling the property, which shows the intention of the testator that they should conduct the sale. The settlement by estate rests on the word "sojourner," in statute 13 & 14 Car. 2, c. 12. He must be there to take care of his own; he must have some beneficial interest, though it need not be a pecuniary one; a bare legal estate is not sufficient; the trustee

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of an outstanding term, would not gain a settlement. In *Rex v. Stone*, 6 T. R. 295, the executor held in trust for the widow, during her life. In *Rex v. Oakley*, 10 East, 491, which was the case of a guardian in socage, Le Blanc, J., said (p. 495): "In order to make persons irremovable on account of having property in a parish, it is not necessary to have a beneficial interest in it for themselves, but it is sufficient that they reside there for some beneficial purpose to another." In *Regina v. St. Margaret's, Leicester*, 2 Q. B. 559, where the will was more formal than in this case, it was held that the legal estate was in the trustees, and that no settlement was gained by the children of the devisor. Coleridge, J., said (p. 567): "This court is always proceeding on rather tender ground when it looks into equitable interests: but on that subject a broad line has been drawn; if the interest is clear, this court will regard it; but the court will not go into cases in which it is doubtful what a court of equity would do." And Wightman, J., said: "There were nine equitable tenants in common. To elect that the land should remain unsold, all must have concurred. Equity would not have assisted one applying singly." The decision of Gould, J., in *Rex v. Natland*, 1 Burr. S. C. 793, was overruled in that case.

[ERLE, J. *Rex v. Wivelingham*, 2 Dougl. 767, which affirmed *Rex v. Natland*, was decided in full court.]

That case was not referred to by the judges in *Regina v. St. Margaret's, Leicester*; but the distinction in that case is, that though the estate was devised to trustees to be turned into personalty, the parties entitled to the surplus after payment of debts, were capable of taking the estate as land, and they elected to do so. Here some of the devisees were minors, and therefore could not make an election. In *Rex v. Wivelingham*, the point, that one of the devisees was a married woman, and could not consent, was not taken.

[CROMPTON, J. Here you do not want consent.]

If the property is not to be sold for several years, must not the devisees receive the rents in the mean time?

[LORD CAMPBELL, C. J. Upon your hypothesis, that the executors only have power to sell, the devisees would have no power to collect the rents after the death of the testator. The pauper and her husband might remain in possession, without asking permission of any one. This is a stronger case than *Rex v. Wivelingham*, the executors not having sold.]

The property belonged partly to them, and partly to the other daughter of the testator, and partly to his grandchildren.

[LORD CAMPBELL, C. J. Suppose there were crops growing at the time of the death of the testator, the pauper and her husband must have gathered the produce of the land, and accounted for it.]

There was no coming on the land by the pauper or her husband.

Dasent and *Mills*, contra, were not called upon.

LORD CAMPBELL, C. J. It seems to me clear, that, upon the authority of all the decided cases, a settlement was gained by the pauper,

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there being a legal title coupled with an equitable interest in the children and grandchildren of the testator.

ERLE, J.¹ As I construe the will, the legal estate descended to the pauper jointly with the other children of the testator, and she had, also, a beneficial interest, and, until the power of sale was exercised, she had a right to reside upon the property. There are abundant cases which show that where there is any beneficial interest, a settlement is gained. There is no case, except *Regina v. St. Margaret's, Leicester*, 2 Q. B. 559, in which the contrary has been held. It is not necessary to say more about that case now.

CROMPTON, J. As soon as it is conceded that the legal estate descended to the heirs at law, it is clear that, under the will, the pauper had such an estate as gave her a settlement.

Orders quashed.

REGINA v. THE INHABITANTS OF EARDISLAND.

June 14, 1854.

Highway — Non-repair — Indictment preferred at Quarter Sessions — Removal by Certiorari — Costs of Prosecution — Judge's Order.

By statute 5 & 6 Will. 4, c. 50, s. 95, in case of an indictment preferred by order of justices, "the costs of such prosecution shall be directed by the judge of assize before whom the said indictment is tried, or by the justices at such quarter sessions, to be paid out of the rate made and levied, in pursuance of this act, in the parish in which such highway shall be situate: provided, that it shall be lawful for the party against whom the indictment is preferred at the quarter sessions to remove it by *certiorari*."

On an indictment removed into this court by *certiorari* at the instance of the prosecutor, and tried at *Nisi Prius*, the judge made an order that "the costs of the prosecution should be paid out of the rate made and levied in the parish of E.:" —

Held, first, that such order might be made, though the indictment was removed at the instance of the prosecutor.

Secondly, that it was no objection that the costs were ordered to be paid out of the rate made and levied, instead of out of the rate to be made and levied.

Thirdly, by Lord CAMPBELL, C. J., and ERLE, J., (CROMPTON, J., dissenting,) that the order need not state the amount of the costs.

INDICTMENT for the non-repair of a highway, preferred at the quarter sessions for the county of Hereford, by direction of justices, under section 95 of statute 5 & 6 Will. 4, c. 50. The indictment had been removed by *certiorari*, at the instance of the prosecutor, and was tried, before Wightman, J., at the last Herefordshire Spring Assizes.

¹ COLERIDGE, J., was at the sittings in London.

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It was contended for the defendants that there was no highway. A verdict having been found for the crown, Wightman, J., made an order, under section 95, which was indorsed upon the record of *nisi prius*, that "the costs of the prosecution should be paid out of the rate made and levied in the parish of Eardisland, in pursuance of statute 5 & 6 Will. 4, c. 50;" and a side-bar rule was afterwards obtained, that it be referred to the coroner and attorney of the court, to tax the costs. In Trinity term,¹

Whateley moved for a rule calling upon the prosecutor to show cause why the order of Wightman, J., and the side-bar rule, should not be set aside. First, where the indictment is removed at the instance of the prosecutor, section 95 of statute 5 & 6 Will. 4, c. 50, does not apply. The power of ordering costs was given for the benefit of the defendant, if he removed the indictment by virtue of the proviso. It would be a hardship on the defendant that he should pay the additional costs caused by the removal of the indictment at the instance of the prosecutor.

[COLERIDGE, J. It must be assumed that the indictment was removed for the purposes of justice. The clause giving power to order costs is independent of the removal of the indictment by *certiorari*. He referred to *Regina v. Pembridge*, 3 Q. B. 901; 3 G. & D. 5, on sect. 98.]

Secondly, the order ought to have specified the amount of the costs. *Regina v. Clark*, 5 Q. B. 887; *Regina v. Watford*, 4 Dowl. & L. 593.

[COLERIDGE, J. In *Regina v. Clark*, the indictment is not removed by *certiorari*, and therefore was not in this court.]

Thirdly, the order should have directed the costs to be paid out of the rate to be made.

[COLERIDGE, J. It is for the benefit of the defendants; or if it does them no harm, they cannot stand upon this objection.]

THE COURT refused a rule upon the first and third objections, but granted a rule upon the second.

Keating and *Gray* now showed cause. It is not necessary that the order of the judge for the payment of costs in this case should state the amount of the costs. When an indictment preferred at the quarter sessions, is removed by *certiorari*, it becomes a record of this court, with all its incidents, and the amount of the costs will be ascertained by the master of this court, being taxed in the usual way.

[LORD CAMPBELL, C. J. The master says that such has been the practice of the court.]

In *Regina v. Clark*, 5 Q. B. 887; the indictment was tried on

¹ May 27, before COLERIDGE, J., ERLE, J., and CROMPTON, J.; Lord CAMPBELL, C. J., was absent, on account of the death of a near relative.

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the crown side as an ordinary indictment; and then the amount must be ascertained at the assizes, because the judge of assize sits on the crown side, as the court; and the commission having expired, there was no officer to whom it could be referred, to ascertain the amount.

[CROMPTON, J. The order for costs is on a collateral matter, and is made upon a person not a party to the record. This court could not make such an order. The making of the order for costs is incident to the court sitting at Nisi Prius, as it is to the court of quarter sessions. I do not see the reason for the rule that the court shall ascertain the amount of the costs; but it would be strange to have two different rules — one for a judge at Nisi Prius, and another for the quarter sessions.]

The quarter sessions would adjourn for the purpose of having the costs ascertained. After the costs have been ascertained by the master, Wightman, J., might make an order for payment of the amount.

[CROMPTON, J. If there are to be two orders, should not the first order be to tax the costs?]

This court must order the taxation of costs: the judge at Nisi Prius is not provided with an officer competent to tax them. In *Regina v. Pembridge*, 3 Q. B. 901; 3 G. & D. 5, the prosecutor's costs were taxed on a side-bar rule, but this objection was not taken. In *Regina v. Watford*, 4 Dowl. & L. 593, the order did not state out of what fund the costs were to be paid.

Whateley and Skinner, contra. It is not a question of convenience, but what is the right course under section 95 of statute 4 & 5 Will. 4, c. 50. It is admitted, that if the indictment had been tried at the quarter sessions, or in the crown court, the order for payment of the costs must have stated the amount; and the judge at Nisi Prius, and the court of quarter sessions are put in the same category in section 95. The power to order the costs to be paid is given to the judge at Nisi Prius, not to this court. The clerk of assize might tax the amount; and if not, the judge himself must ascertain it. *Regina v. Clark*, 5 Q. B. 887, is not distinguishable in principle.

[LORD CAMPBELL, C. J. In that case, *Williams, J.*, 5 Q. B. 894, 895, seems to have thought that a judge's order made before the amount was ascertained was not objectionable, as putting matters in a proper course.]

LORD CAMPBELL, C. J. I am of opinion that this rule ought to be discharged. It seeks to disturb the practice which our most accurate officer certifies to us has long prevailed, and which is a convenient practice, because the judge at Nisi Prius is not provided with an officer competent to tax the costs; and it is not contrary to the act of parliament; if it were, we must be bound by the act.

As far as the rule seeks to set aside the order of the judge, there is no pretence for it, because it is in *ipsissimis verbis*, according to section 95. of statute 5 & 6 Will. 4, c. 50. Then what has been done

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by the side-bar rule, whether right or wrong, cannot affect that. But, further, I am of opinion that the side-bar rule ought to be granted, and the costs ascertained by the officer of this court. The taxation of them would include the costs subsequent to the trial, and they could not be ascertained by the judge, when he made his order. This is a case in which the indictment has been removed by *certiorari*, and has become a record of this court. We must give judgment upon it, and we are invested with the power to order our officer to ascertain the amount of the costs. It has been pointed out by my brother Erle, that three tribunals are contemplated by the legislature, and that the judge at Nisi Prius tries under the authority of this court. I think that it is entirely within the fair interpretation of the act, that in the case of a trial before a judge at Nisi Prius he is to make the order, and that that order is to be carried into effect by the officer of this court under a side-bar rule, whereby the amount of costs then incurred may be ascertained much better than can be done at Nisi Prius; and he can ascertain the amount of the costs down to the time of final judgment.

This is not contrary to either of the cases which have been cited. In *Regina v. Clark*, 5 Q. B. 887, there was no ground for the *mandamus*, and, accordingly, it was decided that, until the amount was ascertained, the court could not enforce the order. In *Regina v. Watford*, 4 Dowl. & L. 593, the court proceeded on the ground that the order was bad on the face of it, for not ascertaining the fund out of which the amount was to be paid.

ERLE, J.¹ I am also of opinion that the rule should be discharged. The statute has provided three tribunals for the trial of indictments for the non-repair of a highway; and although one of them is improperly called the judge of assize, the judges of assize sit under several commissions, and that under which they try indictments removed into this court by *certiorari* is the commission of Nisi Prius. It has been held that the quarter sessions must, in their order for the payment of costs, specify the amount; and the judge of assize, when sitting as a commissioner of oyer and terminer, must also specify them. The direction as to costs in section 95 of statute 5 & 6 Will. 4, c. 50, is used with reference to those two tribunals. In the present case, the indictment has been removed from the quarter sessions by *certiorari*, and the question is, whether under section 95, there is a distinction between the cases just referred to, and those in the proviso. The prosecutor may remove the indictment by *certiorari*, and I assume that the statute did not intend to take away the right to costs, where the additional costs caused by the *certiorari* had been incurred. In the first two cases, the commissioner or the quarter sessions must specify the amount of the costs; and there is great reason for that, because that tribunal has the power finally to dispose of the indictment; and it may well be that the person intrusted with

¹ COLERIDGE, J., was in the Central Criminal Court.

such judicial powers should not depute an inferior officer to determine an important matter, except under his eye, in the view of the law, by adopting in his order the amount taxed by the officer. Section 95 requires that payment of the costs of the prosecution shall be directed by the judge of assize, or by the quarter sessions; and that must be done before the tribunal has put off its authority, not, indeed, by taxing the costs itself, but by adopting the taxation of its officer. But does that reason apply where the indictment has been removed by *certiorari*? In the first place, if tried in this court at bar, which it might be, after the verdict has been returned the *postea* is taken to the officer for the taxation of costs, and the court *sub silentio* adopts his taxation, though there is no audible sanction or written authority. If it is sent down to be tried at Nisi Prius, it would be tried by a judge of assize, in the popular sense of that term; but the judge under a commission of Nisi Prius would try on behalf of this court, and the analogy of a trial at bar would exist in respect of his authority. He would not determine the amount of the costs, seeing that the Nisi Prius record must be sent back into the crown office, and subsequent costs would be incurred until judgment was entered up, which he could not ascertain. The record having come back to this court, this court, having given directions to its officer to tax the costs, would adopt the act of its officer before final judgment was given. There is a further argument in favor of this course; because the trial at Nisi Prius is liable to be set aside, and if a new trial is granted, the certificate of the judge would fall to the ground; whereas an *interim* order in the cause would not be set aside. This court has power to grant the side-bar rule. Therefore, I am of opinion that the right course has been pursued.

CROMPTON, J. I agree that there is no reason for setting aside the judge's order, which directs that the costs of the prosecution shall be paid; but, as at present advised, I do not see how the prosecutor can be allowed to proceed in obtaining the costs under the authority of this court. It seems to me that after the decisions which have been referred to, whether right or not, this court has nothing to do in the matter; the judge at Nisi Prius is the person whose act is to ascertain the amount of the costs. The effect of a side-bar rule is the delegation of the authority of this court to its officer; the party gets the rule, and the costs are taxed, and then an attachment issues of course, and the judge who tried the indictment would have no power to interfere. According to Patteson, J., in the case of *Regina v. Clark*, 5 Q. B. 887, 894: "When the legislature says that the judge shall direct the costs to be paid, the meaning must be, that he should ascertain the amount, either by himself or his officer, or some one whose advice he may take. I do not inquire whether this must be done during the time for which the judge holds the commission, or may be done at any time afterwards; but it is by him that it must be done at some time or other." That is a judgment on the very matter in dispute in this case. Suppose the judge were not a judge of this court, and directed his own officer to tax the costs, and

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it is admitted that on the trial of an indictment in the crown court it must be done through the officer, by allowing the order to be enforced by attachment in this court, we take the control of the ultimate amount of the costs from the judge. When the officer deputed by him has taxed the costs, he need not assent to that amount; but the power of withholding his assent will be withdrawn from him by this course, because he cannot say that the amount is wrong, though he might think that it was. Suppose the judge specifies the amount of the costs in his order, as he may do, may the amount be also ascertained in this court? Therefore, I think the side-bar rule was improper, and the proceeding ought to be for disobedience to the order. And there is no difficulty in that course, because I do not find that the judge is to ascertain the costs, while he is sitting in court; and Williams, J., in *Regina v. Clark*, 5 Q. B. 895; intimates that the amount may be ascertained after the commission has expired, and therefore after all the costs have been incurred.

It is said that three tribunals for the trial of an indictment for the non-repair of a highway are referred to in statute 5 & 6 Will. 4, c. 50; but as I read the proviso, its object is to provide that the enactment shall not prevent the indictment being removed by *certiorari*. In the case before us, where the indictment has been removed by one of the parties, it was not intended to make a new tribunal to decide the matter. If it was tried in the full court here, we might grant a certificate, which we could not do in the first instance. But it is not meant that the judge at Nisi Prius should do part, and this court should do the rest. Therefore, though it may be inconvenient, I think that the order should state the amount of the costs.

LORD CAMPBELL, C. J. I do not think that there is a double mode of proceeding. I think that, after making the order, the judge is *functus officio*; and the amount of the costs is to be ascertained in this court. In the case of an indictment removed by *certiorari*, the judge is to grant his certificate, and the only mode of enforcing it is by a side-bar rule, and taxation by our officer.

CROMPTON, J. The defect of that is, that the judge at Nisi Prius would have no power to dissent from the amount taxed by the officer of this court.

Rule discharged.

Regina v. Jarvis.

REGINA v. JARVIS.

May 4, 1854.

*Inspectors of Weights and Measures — Appointment without Salary —
Superintendents of Police — Jurisdiction of Sessions.*

The quarter sessions, acting under statute 5 & 6 Will. 4, c. 63, s. 17, appointed an inspector and superintendents of police, to be inspectors of weights and measures, without remuneration : —

Held, that there was nothing in statute 2 & 3 Vict. c. 93, which rendered the appointment an excess of jurisdiction, and therefore, it could not be questioned in this court, the *certiorari* being taken away by section 36 of statute 5 & 6 Will. 4, c. 63.

APRIL 27. *Worlledge* obtained a rule *nisi* to quash an order of the Suffolk Quarter Sessions, holden in February, 1854, which had been removed by *certiorari*, by which the justices, in pursuance of section 5 & 6 Will. 4, c. 63, had appointed an inspector and four superintendents of police to be inspectors of weights and measures for four districts of the county respectively, without assigning them any additional salary, or remuneration for that service.

Power, subsequently obtained a rule calling on the defendant to show cause why the writ of *certiorari* should not be quashed, and the return made thereto be taken off the file of the court and sent back to the sessions.

Worlledge, now showed cause. The order in question is bad for want of jurisdiction; and therefore section 36 of statute 5 & 6 Will. 4, c. 63, which takes away the *certiorari*, does not apply. By section 17, the quarter sessions are required to direct a reasonable remuneration to be paid to the inspectors for the discharge of their duties.

[LORD CAMPBELL, C. J. The omission to do that will not make the order void for want of jurisdiction. Suppose a person was willing to serve gratuitously.]

By section 10 of statute 2 & 3 Vict. c. 93, the constables appointed under that act "shall be restrained from employing themselves in any office, or employment for hire, or gain, other than in the execution of their duties under this act."

[WIGHTMAN, J. The appointments in this case are not for hire or gain.]

CROMPTON, J. Might not the justices appoint the superintendents and inspectors without salary, in order to fill up the time for which they were paid under statute 2 & 3 Vict. c. 93?]

They might get profit from the employment by laying informations, and receiving a moiety of the penalties and forfeitures, under section 32 of statute 5 & 6 Will. 4, c. 63.

[WIGHTMAN, J. They would get the fines as informers, and not as inspectors.]

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Further: the duties of superintendent and of inspectors of weights and measures are inconsistent. The inspectors must on certain days be at certain places, while the duties of the office of superintendent or constable might require his presence elsewhere. [He referred to section 7 of statute 2 & 3 Vict. c. 93.]

[WIGHTMAN, J. That suggestion does not show want of jurisdiction.]

Power and Couch, contra, were not called upon.

LORD CAMPBELL, C. J. I do not know that the justices have exercised an unsound discretion in this matter; but, at any rate, it is quite clear that no excess of jurisdiction is shown.

WIGHTMAN, J., and CROMPTON, J., concurred.

Rule absolute.

REGINA v. JONATHAN RUSSELL.

June 12, 1854.

Indictment — Civil Right — Verdict for Defendant — New Trial — Misdirection — Verdict against Evidence.

By LORD CAMPBELL, C. J., and CROMPTON, J. Where, in an indictment not charging an offence for which the defendant, if guilty, might suffer fine and imprisonment, a civil right comes in question, and the right would be bound by the verdict, a new trial may be granted after a verdict for defendant.

But by COLERIDGE, J. Wherever the substance of a criminal proceeding is civil, a new trial may be granted after a verdict for defendant, on the ground either of misdirection, or of the verdict being against the evidence.

Held, accordingly, by LORD CAMPBELL, C. J., and CROMPTON, J., (COLERIDGE, J., dissenting,) that where an indictment charged defendant with erecting an obstruction to the navigation of the Menai Straits, and the right to an oyster fishery was in question, the court ought not to grant a new trial after verdict for defendant.

By COLERIDGE, J., and ERLE, J. There was not sufficient ground for granting a new trial, either in the direction or the finding of the jury.

INDICTMENT found at the Carnarvonshire Quarter Sessions, and removed by *certiorari*, charged the defendant with wilfully and injuriously erecting, putting, and placing on and across a bank of sand, and on and across certain land, covered with water in the Menai Straits, a stone wall of great length and height, to wit, &c., and with unlawfully and injuriously putting and placing divers heaps of large stones in and upon the said bank, and the said land so covered with water, so that the subjects of the queen could not go, return, pass, repass, labor, stay, or anchor with their ships and other sailing vessels, steam vessels, and boats, in and over the said land so covered with water, and in and over the said bank when covered with water, as they ought, and were wont and accustomed to do, to the great dam-

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age and common nuisance of her Majesty's subjects. Plea — not guilty. On the trial, before Williams, J., at the Spring Assizes for Carnarvonshire, it appeared that the right to an oyster fishery, in the Menai Straits, was in question; that one of the embankments, which had been erected in 1852 and 1853, upon the site of an old weir, for the purpose of the oyster fishery, extended one or two feet below low-water mark, at neap tides, but, at spring tides, the mud was dry for the space of eleven feet below the lowest part of it; the height of the main embankment, above the natural level of the shore-way, did not exceed fourteen inches, and the average height of the other embankments did not exceed ten inches, the lowest point being seven, and the highest thirteen. The learned judge, in summing up the case to the jury, which was special, cited the language of Lord Denman, in *Rex v. Tindall*, 6 Ad. & El. 143, 152, and directed them, that if they thought that it had been established, that the defendant's acts had caused a material nuisance or obstruction to the public navigation, they must find him guilty; but, if they thought the acts of obstruction so slight and rare as not to render him criminally responsible, they must acquit him. The jury, on returning their verdict, said: "We find the defendant not guilty, for we consider that the embankments, though a nuisance, were not sufficiently so to render the defendant criminally liable." The learned judge thereupon directed a verdict of not guilty. In the following Easter term, April 21,

Lloyd moved for a rule *nisi* for a new trial, on the grounds of misdirection, and of the verdict being against the evidence.

[LORD CAMPBELL, C. J. Can you move for a new trial in a criminal case, after a verdict of not guilty? The course, recently adopted, has been to move that judgment be not entered.]

In *Regina v. Chorley*, 12 Q. B. 515, a new trial, on the ground of misdirection, was granted, after a verdict for the defendant.

Rule nisi.

In Trinity term, June 8 and 12,

Welsby and *M'Intyre* showed cause. First, the court will not grant a new trial in a criminal case, after a verdict for the defendant, on the ground that the verdict was against the evidence. Formerly, it was not granted in a penal action; *Wilson v. Rastall*, 4 T. R. 753; and in *Hall v. Green*, 9 Exch. 247; s. c. 24 Eng. Rep. 453, which was an action for a penalty, under statute 25 Geo. 2, c. 36, s. 2, the court refused a rule for a new trial, on the ground that the verdict for the defendant was against the evidence.

[LORD CAMPBELL, C. J. And in that case there was no indirect manner in which the court could arrange to have the case reconsidered. In an indictment, preferred substantially to try a civil right, it has been usefully decided, since I left the bar, that the court will stay the judgment, in order that a fresh indictment may be preferred.]

In *Calcraft v. Gibbs*, 5 T. R. 20, which was a penal action, Lord Kenyon said: "Where there is any ground of objection to the law

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delivered by the judge, on which the verdict has proceeded, if such objection be well founded, it is immaterial what the nature of the cause is."¹

[COLERIDGE, J. A penal action may be very odious and oppressive: it does not follow that the proceeding by indictment should be so, though the form is criminal.]

In *Regina v. Chorley*, 12 Q. B. 515, the first case in which a new trial was granted in a criminal case, after a verdict for the defendant, the motion was on the grounds of misdirection and the improper reception of evidence. [They cited: *Rex v. Wandsworth*, 1 B. & Al. 63; Lord Ellenborough, in *Rex v. Chigwell*, Id. 67, note; and the argument of Scarlett, in *Rex v. Sutton*, 5 B. & Ad. 52, 55.]

[LORD CAMPBELL, C. J. In *Regina v. Chorley*, the judgment on the indictment, which was for obstructing a public footway, would have bound the right.

CROMPTON, J. Is there any case in which a new trial has been granted in a criminal case, unless where the indictment was for a non-feasance?]

Secondly, the direction to the jury was right. In *Rex v. Tindall*, 6 Ad. & El. 143, Lord Denman, C. J., said: "We hold, that no person can be made criminally responsible for consequences so slight, and uncertain, and rare, as are stated by this verdict, to result from the works of the defendants;" the finding of the jury being, that, "by the defendants' works, the harbor was in some extreme cases rendered less secure." [They also cited: Hale de Port. Maris, part 2, c. 7, p. 85, cited in *Rex v. Russell*, 6 B. & Cr. 571; and *Regina v. Betts*, 16 Q. B. 1,022; s. c. 22 Eng. Rep. 240.]

[COLERIDGE, J. What is the meaning of the word "rare?"]

Not of continuous operation. The use of the word "nuisance," instead of the word "obstruction," does not make it a misdirection. In *Rex v. Russell*, 6 B. & Cr. 566, Lord Tenterden said: "It would be a very ill compliment to juries to suppose, that they are likely to be misled by such accidental expressions;" and this case was tried before a special jury.

[LORD CAMPBELL, C. J. What force is to be given to the words, "material obstruction?" If it were an obstruction at all to the navigation of the Menai Straits, would it not be a nuisance?]

Not unless it was an appreciable obstruction.

[LORD CAMPBELL, C. J. I cannot conceive that if in *Rex v. Tindall*, 6 Ad. & El. 143, the works of the defendants were calculated to endanger life and property, it would not have been a nuisance, because rare.]

Thirdly, the verdict was warranted by the evidence.

Morgan, contra. First, in *Regina v. Cricklade*, 13 Jur. 33,² which was an indictment for the non-repair of a highway, Lord Denman,

¹ See also the observations of Lord Kenyon in *Rex v. Mawbey*, 5 T. R. 619, 638.

² The case on the second trial is reported in 14 Q. B. 535.

C. J., said: "A motion may be made directly for a new trial, if the verdict appears unsatisfactory."

[LORD CAMPBELL, C. J. The case of *Regina v. Chorley*, 12 Q. B. 515, on examination, resolves itself into a pure question of civil right, in which the punishment would be merely nominal: in this case, the defendant might be visited with fine and imprisonment. The generality of the language of Lord Denman, in *Regina v. Cricklade*, 13 Jur. 33, must be confined to cases in which the question in the indictment is on the right.

CROMPTON, J. It can hardly be extended to indictments for carrying on a manufacture, or causing some other nuisance near a public highway.]

Secondly, the only question left to the jury was as to the degree of obstruction. If the verdict had been entered as the jury delivered it, it would have been inconsistent. [He referred to Lord Denman's observation, in *Rex v. Ward*, 4 Ad. & El. 384, 407; on the passage in Hale de Port. Maris, part 2, c. 7, p. 85.] *Regina v. Betts*, 16 Q. B. 1022; s. c. 22 Eng. Rep. 240, only proves, in favor of the defendant, that when there is an unauthorized erection in a public highway, not being a nuisance, it is not indictable. [He cited: Lord Kenyon, in *Hubert v. Groves*, 1 Esp. 148; and *Regina v. Randall*, 1 Car. & M. 496.]

LORD CAMPBELL, C. J. I am of opinion that this rule ought to be discharged. I do not feel myself called upon to give any positive opinion as to the direction of the learned judge; probably it was not wrong in substance, though it was not in a very felicitous form: nor am I called upon to give a positive opinion, whether the verdict was contrary to the evidence. The ground, upon which I proceed, is, that this is a criminal proceeding, and the defendant ought not to be twice vexed for the same cause. Such is the law of England now, and such I hope that it will always continue. There have been recent speculations as to the expediency of granting a new trial in criminal cases — even in cases of trial for murder. I reprobate such speculations. If there is an improper conviction, let it be set aside; if there is an acquittal, let it stand, and the prisoner have the benefit of it. But, consistently with that, where in an indictment a civil right comes in question, a new trial may be granted, after a verdict for the defendant. I entirely agree that, where the right would have been bound by the verdict, and no serious offence was charged in the indictment, the practice was to interfere by suspending the judgment, in order that a fresh indictment might be preferred; and in *Regina v. Cricklade*, 13 Jur. 33, Lord Denman, C. J., and his learned brothers did well when they said, that they would do directly what had before been done indirectly. But, I should be sorry to extend the practice to cases where a grave offence is charged: it would deprive the prisoner of the benefit of an acquittal. I do not know where it would stop: it would extend to indictments for nuisances in carrying on unwholesome trades, and go on to indictments for manslaughter, and, for aught I see, to indictments for murder. In the present case, a

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the constable, but the grand-jury threw out the bill. The plaintiff brought an action against the constable, (*Taylor v. Dove*, which was tried at the same assizes,) and recovered 40s. on the first count, and 8l. on the second. Before the commencement of this action, the following notice of action was served upon the defendant: "To R. W. M. Nesfield, Esq., acting as one of her Majesty's justices of the peace for the county of Derby. I, Matthew Taylor, of &c., do hereby, according to the form of the statute in such case made and provided, give you notice that I shall, at or soon after the expiration of one calendar month from the time of your being served with this notice, cause a writ of summons to be sued out of her Majesty's Court of Queen's Bench at Westminster against you at my suit, and proceed therein according to law; for that you, the said R. W. M. Nesfield, on the 3d day of November last past, with force and arms, caused me to be assaulted, beaten, and ill-treated by one James Dove, to wit, at Bakewell aforesaid; and also then caused me to be apprehended and seized and laid hold of, and to be forced and compelled to go into, through, and along divers public highways, streets, and places to a certain lock-up or prison at Bakewell aforesaid, and to be unlawfully imprisoned, and kept and detained in prison, in a certain dark and unwholesome prison or place, without any reasonable or probable cause whatsoever, for a long space of time, to wit, for the space of one night and a day then next following, contrary to the law and custom of this realm, and against the will of the said Matthew Taylor; whereby I, the said Matthew Taylor, was then not only greatly hurt and injured, but was greatly exposed, and injured in my credit, character, and circumstances." It was objected on behalf of the defendant, that the notice required by section 9 of statute 11 & 12 Vict. c. 44, was insufficient, for omitting the word "maliciously," which was necessary to a cause of action under section 1. The learned judge, being of that opinion, confined the plaintiff to the first count of the declaration, and the jury returned a verdict for the plaintiff on that count, damages one farthing. In the following Easter term, (April 22,)

Macaulay moved for a rule *nisi* for a new trial, on the ground of misdirection, and of the amount of damages being insufficient.

THE COURT granted a rule *nisi* on the first ground only.

Mellor and *Hayes* now showed cause. Stat. 11 & 12 Vict. c. 44: "An act to protect justices of the peace from vexatious actions for acts done by them in execution of their office," by section 1 enacts, that every action brought against any justice of the peace "for any act done by him in the execution of his duty as such justice, with respect to any matter within his jurisdiction as such justice, shall be an action on the case as for a tort; and in the declaration it shall be expressly alleged that such act was done maliciously, and without reasonable and probable cause. By section 2, "for any act done by a justice of the peace in a matter of which by law he has not juris-

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diction, or in which he shall have exceeded his jurisdiction, the person injured thereby may maintain an action without an allegation in the declaration that the act complained of was done maliciously and without reasonable and probable cause. Section 9 enacts that, in the notice of action, "the cause of action, and the court in which the same is intended to be brought, shall be clearly and explicitly stated." This action is in respect of an act done by the defendant, as a justice, within his jurisdiction; and therefore, by section 1, malice is an essential part of the cause of action; and a notice which omits an essential ingredient in the offence created by the statute is bad. Bayley, J., in *Towsey v. White*, 5 B. & Cr. 125, 133. [They also cited *Lovelace v. Curry*, 7 T. R. 631.] If the word "maliciously" may be omitted, there is no reason why the words "without reasonable and probable cause" may not also be omitted. Further: this notice applies to a different and distinct cause of action to that stated in the second count, namely, an act done without jurisdiction, under section 2.

Macaulay and *Brewer*, contra. The notice of action is applicable to the second part of the second count. It informs the defendant of the act for which he is to be sued. The object of the notice is to give the justice an opportunity of tendering amends under section 11; and the defendant, being the person who did the act complained of, would tender amends or not, according to his belief that he had been actuated by malice or not. In *Towsey v. White*, 5 B. & Cr. 125, which was an action of debt for penalties, the notice did not show that an offence had been committed against the act of parliament. In 2 Chit. Statutes, 712, note (e), 2d ed., it is said that the notice "is quite sufficient if it calls the attention of the defendant to the general nature of the injury, so that he may know what the ground of complaint is."

LORD CAMPBELL, C. J. I should be extremely sorry to require any nicety in framing notices of action; and if the objection had been the mere omission of the word "malicious," I should have struggled to overcome it. But I think this is not a notice of action within section 9 of statute 11 & 12 Vict. c. 44, which requires that in the notice the cause of action shall be clearly and explicitly stated. Does this notice clearly and explicitly show that the cause of action is under section 1 of the statute? Quite the contrary; because, under section 2, the action would sound in trespass for an act done without, or in excess of the jurisdiction. Therefore the notice is not only defective, but contains terms which would mislead the defendant; and therefore it does not entitle the plaintiff to avail himself of the second count.

COLERIDGE, J. Section 9 requires that the notice of action should clearly and explicitly state the cause of action. This notice, if strictly construed, does not do so, because it omits a fact which is essential in an action on the case. Where the action is against a justice for an act done within his jurisdiction, the act must have been malicious, and malice must be alleged in the declaration. I should be sorry to

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introduce special demurrers in construing these notices, and therefore I think we should not require more than a statement from the plaintiff of what the act is for which he is going to bring an action. But there are two causes of action under sections 1 and 2 of statute 11 & 12 Vict. c. 44, and the language of the notice is framed to meet one, and not the other. There is no improper strictness in holding that this notice is not sufficient; it is advancing the object of the act.

ERLE, J. I am also of opinion that the notice is bad for not informing the defendant that the action was to be brought because he had done the acts described with malice. The defendant was liable to an action in two respects: first, under section 1, if he committed a mistake as to his jurisdiction; and, secondly, under section 2, if he acted with a corrupt motive within his jurisdiction. The latter act is charged by the word "maliciously." That word is left out of the notice, and therefore it is essentially bad, as tending to mislead.

CROMPTON, J. I am of opinion that the chief justice was right. The notice is not to be so loose as to give no information, and what is worse, to mislead. If the action was brought against the justice for an abuse of his office within his jurisdiction, he would suppose that it was brought under section 2. This notice would lead the defendant to suppose that the action was brought under section 1, when the plaintiff was going to bring it for a much more serious act, perhaps, under section 2.

Rule discharged.

SILLEM v. THORNTON.

June 13, 1854.

Fire Policy — Description of Premises — Warranty — Alteration of Premises.

Fire policy for one year upon a "brick building used as a dwelling-house and store, (described in a paper attached to this policy,) situated at," &c. Description annexed, that the house was composed of two stories, of given height and materials, with a given roof, and given means of obtaining water, &c. During the year, the house was altered, by adding to it an additional story, but so that the alterations did not increase the hazard or probability of fire, except so far, if at all, as the increase of the area of a building by a third story may be considered to have necessarily increased such hazard or probability; and afterwards, during the year, the house was totally burnt: —

Held, upon a special case, that the underwriter was not liable; for the description was by reference incorporated into the policy, and the description amounted to a warranty, and not only to a warranty that the building was as described at the time the description was given and at the date of the policy, but that it would not be altered by the assured, so as to increase the risk during the year, and that it had been so altered.

ACTION upon a fire policy for 1,600*l.*, effected by the plaintiffs as agents for Godeffroy, Sillem, and Co., of San Francisco, with the de-

fendant, upon a brick building, at San Francisco. The defendant pleaded, fifthly, in substance, that, by a paper attached to the policy, the building was warranted to answer a certain description, and that such warranty was broken. Replication, *de injuriâ*. Special case. The plaintiffs are the agents of Godeffroy, Sillem, and Co., who are merchants at San Francisco, in California. The defendant is an underwriter, in London. Godeffroy, Sillem, and Co., were, from October, 1850, to the time of the fire, &c., the owners of a brick building used as a dwelling house and store, situate at the corner of Clay and Leidersdorff streets, at San Francisco, in California, built in September, 1850. In October, 1850, being desirous to insure, &c., they transmitted to their agents a description of the building as it stood, being the description annexed to the policy of insurance, &c. The cost of this original building, was 6,000*l.*, valued in the policy at 4,000*l.* In March, 1851, Godeffroy, Sillem, and Co. were desirous of erecting a third story to the building. They commenced doing so on the 26th of March, 1851, and between that date and the time of the fire, the following alterations and additions were made. The walls of the original building were carried up to make a third story, and the roof was put upon that story; the new walls being carried up in all 13 feet, of which 3 feet were above the new roof. The new walls were 12½ inches thick. The new roof was not covered with zinc or other metal; it was composed of a layer of brick, a layer of cement, and then another layer of cement. The original building remained, the roof being flat, and not having been interfered with; but the reservoir was, on the 2d of May, 1851, taken from the top of the old roof and placed on the top of the new roof, that being necessary in order to allow of the completion of the improvements in the interior of the additional story. Such removal was intended to be permanent, and to be made to communicate with the requisite pipes. When the reservoir was so removed, four hogsheads of water, communicating with the water-pipe, so that they could be refilled as often as necessary, and containing 240 gallons, were placed on the old roof, which had then become the floor of the additional story. In addition to this, the old roof could be flooded with water by means of a pipe connected with the pump. The reservoir, from the time when placed on the new roof, up to, and at the time of the fire, had a foot of water in it. There was no feed-pipe attached to it, and no communication with the force-pump, or other means of filling it with water adapted to it. There was no pipe on the new roof with holes in it, or other means capable of maintaining a constant or any stream of water, over such roof; nor were there any means of supplying water to such roof, except by buckets. There were four openings for windows in the new story. Shutters of iron had been ordered for them, but had not been sent home, and they had no shutters of any sort, up to, or at the time of the fire. During the fire, these holes were stopped up with wet blankets. These works cost 1000*l.* They are to be taken as not having increased the hazard or probability of fire, except so far, if at all, as the increase of the area of a building by a third story, may be considered by the court to have necessarily

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increased such hazard or probability. On the 7th April, 1851, the plaintiffs, as agents for Godeffroy, Sillem, and Co., effected with the defendant a policy of insurance, for 1,600*l.*, as follows:—

“Whereas, Messrs. Herman, Sillem, and Co., merchants, London, have paid, &c., to us, &c., to insure from loss or damage by fire, a brick building, used as a dwelling-house and store, (described in the paper attached to this policy,) situated at the corner of Clay and Leidersdorff streets, at San Francisco, in California, and belonging to Messrs. Godeffroy, Sillem, and Co., of San Francisco, valued at 4,000*l.* sterling, from noon of the 1st of February, 1851, to noon of the first of February, 1852: now know ye, &c. Dated in London the 7th day of April, 1851.

“£1,600.

RICHARD THORNTON.”

The paper mentioned in the policy, and annexed thereto, was as follows: “Description of brick store in the corner of Clay and Leidersdorff streets. Frontage on Clay-street, 30 feet, on Leidersdorff-street, 59½ feet, more or less. The house is composed of two stories, without a basement story. The ground floor is 12 feet in height, the upper one 10 feet in height. The walls from the foundation to the upper story, are of 20 inches, and those of the upper story of 16 inches thickness. The ground floor is paved, &c. The roof is composed of a layer of cement on wood, and covered with zinc. The walls around the same are raised 3 feet, on two sides, and on the south side about 9 feet, there being at present a wooden building adjoining. On the roof is a reservoir, containing about 600 gallons of water, supplied from an artesian well on the ground floor, in connection with which is a powerful force-pump, by which the first floor is also constantly supplied with water. The roof is also constructed so that by means of a pipe extending the whole length of the same, and supplied at certain intervals with holes, a constant stream of water can be maintained over the entire roof, by working the pump on the lower story. The window and door-frames are attached towards the interior of the building. All windows and doors are supplied with thick iron shutters on the exterior, so that between the shutters or doors is in all places a space corresponding to the thickness of the walls. In this manner, no wood-work, whatever, is exposed externally. The house has been built with the express design of rendering it fire-proof, and no precaution has been neglected to render it so. The tide rises to the opposite side of Leidersdorff-street, which is still unoccupied, and there is in the house itself an almost unlimited supply from the artesian well, &c. We, the undersigned, do certify, that, by request of, &c., we examined brick building at corner, &c., and after, &c., found the above description of the same a perfectly correct one,” &c. Dated the 31st of October, 1850. Signed by Lloyds’s agents, and the agent for the Hambro’ Board of Underwriters. On the night of the 3d of May, 1851, a fire took place at San Francisco, by which a great part of the city, and amongst others the premises insured, were burned to the ground, and the plaintiffs suffered a total loss, with the

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exception of a salvage amounting to 400*l*. The court are to draw inferences, &c., and may allow interest under the 3 & 4 Will. 4, c. 42, s. 1, from the 3d May, 1851. The question is, whether the plaintiffs are entitled to recover in the action, or whether that right is defeated by the alterations and additions aforesaid, which were made in the building. If the plaintiffs are entitled, the verdict to be entered for 1,600*l*., less deduction for salvage, if the court consider the defendant entitled to it, and with interest, if the court adjudge it; if otherwise, verdict for the defendant, &c. Plaintiffs' points: that the identity of the building insured and that destroyed, is undeniable; that the addition of a third story, not adding, in fact, to the hazard or probability of fire, cannot affect the defendant's liability, unless there be a warranty in the policy that the structure shall, in no respect, be improved or added; that the policy contains no such warranty; that the defendant, having retained money which he ought to have paid without litigation, is bound to pay that money with interest, and the court, being in the place of a jury, may award it, under the 3 & 4 Will. 4, c. 42, s. 292. Defendant's points: that the alterations and additions made, &c., were such as to disentitle the plaintiffs to claim a total loss under the policy; that a continuous warranty was given by the written description upon which the policy was affected, which was broken by the alterations made. The case was argued in this term¹ by

Bramwell, for the plaintiffs; and

Willes, for the defendant.

The arguments and cases cited, are fully stated and commented upon in the judgment.

Cur. adv. vult.

LORD CAMPBELL, C. J., now delivered the judgment of the court. We are of opinion that, in this case, the assured are not entitled to recover, as they have broken a warranty on the faith of which the defendant must be considered as having signed the policy. The engagement is, "to insure from loss or damage by fire, a brick building, used as a dwelling-house and store, (described in the paper attached to this policy,) situated, &c., belonging to Messrs. Godeffroy, &c., valued at 4,000*l*., from noon of the 1st day of February, 1851, to the 1st day of February, 1852, at noon." The description in the attached paper, must be supposed to be introduced into the body of the policy between the brackets, instead of the reference to it. *Verba relata inesse videntur*. The following is the commencement of this description: "Frontage on Clay-street, 30 feet, on Leidersdorff-street, 59½ feet, more or less. The house is composed of two stories, without

¹ June 6, before Lord CAMPBELL, C. J., COLERIDGE, J., ERLE, J., and CROMPTON, J.

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a basement story." Then comes a statement, among other things, that the ground floor was covered with marble slabs; that the roof was composed of cement, and covered with zinc; that on the roof was a reservoir containing about 600 gallons of water, which was supplied from an artesian well; that a constant stream of water could be maintained over the entire roof, by working the pump on the lower story; that all the windows and doors were supplied with thick iron shutters, so that no woodwork was exposed externally; and that there was an almost unlimited supply of water from the artesian well. The special case finds that the house was built in September, 1850, at a cost of 6,000*l.*, and that Messrs. Godeffroy, in the month of October following, being desirous of effecting an insurance upon it, transmitted to their agents in London, the description of it attached to the policy. This was a correct description of it in all respects, as it then stood; and on the faith of this description, the defendant signed the policy, dated the 7th April, 1851; but in March, 1851, Messrs. Godeffroy and Co. were desirous of adding a third story to the building. They commenced doing so on the 26th of that month, and had completed it before the 3d May, when the premises were consumed by a conflagration, which laid in ashes almost the whole of San Francisco. The new story cost 1,000*l.* There were various alterations in the roof and other parts of the building, but it was agreed in the case that "the new works are to be taken as not having increased the hazard or probability of fire, except so far, if at all, as the increase of the area of a building by a third story, may be considered by the court to have necessarily increased such hazard or probability."

We are now to consider the effect of the description of the premises insured, which has been introduced into the policy; and in the first place, we are of opinion that it amounts to a warranty that the premises corresponded with it on the 7th April, 1851, or, at least, that the premises had not been altered by the assured in the intermediate time, so as to increase the risk of the insurer when the policy was effected. Mr. Bramwell contended that it referred only to the 31st October, 1850, the date of the certificate of the surveyors in California, who verified its accuracy, and that, if accurate at the time, the policy would not be vitiated by any alteration between that day and the date of the policy; so that, notwithstanding the alteration, the identity of the house was not destroyed. But we think that this position is wholly at variance with the effect which has hitherto been given to the description of the subject-matter insured in policies of insurance, and would utterly defeat the object for which such a description is required. It would seem revolting to common sense if we were to hold, that, as soon as Messrs. Godeffroy and Co. had sent off the description, to be shown to an insurance office, or private underwriter, they might have added several stories to the house, and removed from it all the described safeguards against fire; and that, although the description misdescribed the actual state of the premises at the date of the policy, a fire afterwards happening, an indemnity might be claimed, for which the

underwriter had received no adequate consideration. But this is the principle contended for by the assured. Not being told the exact progress which had been made in the alterations between the 26th March, and the 7th April, we are to draw inferences from the facts stated; and we infer that on the 7th April the building no longer corresponded with the description of it in the policy, and that, by the alteration, the risk of the insurer had in some degree been increased. This alone would be a bar to the present action.

But we are further of opinion that the description in the policy amounts to a warranty that the assured would not, during the time specified in the policy, voluntarily do any thing to make the condition of the building vary from this description, so as thereby to increase the risk or liability of the underwriter. In this case, the description is evidently the basis of the contract, and is furnished to the underwriter to enable him to determine whether he will agree to take the risk at all, and if he does take it, what premium he shall demand. The assured, no doubt, wished him to understand, that not only such was the condition of the premises when the policy was to be effected, but, as far as depended upon them, it should not be altered so as to increase the risk during the year for which he was to be liable if a loss should accrue. Without such an assurance and belief, the statement introduced into the policy of the existing condition of the premises would be a mere delusion. Identity might continue, and yet the quality, condition, and incidents of the subject-matter insured might be so changed as to increase tenfold the chances of loss, which, upon a just calculation, might reasonably be expected to fall upon the underwriter. Can it be successfully contended, that, having done so, the assured retain a right to the indemnity for which they had stipulated upon a totally different basis?

With respect to marine policies, we conceive that if there be a warranty of neutrality, or of any other matter which continues of importance till the risk determines, whether the policy be for a voyage or for a time certain, such a warranty is continuous; and if it be broken by the default of the assured, the underwriter is discharged. The implied warranty of seaworthiness applies only to the commencement of the voyage; but even here, if the assured, during the voyage, were voluntarily to do any act whereby the ship was rendered unseaworthy, and thereby a loss were to accrue, we conceive that they would have no remedy on the policy. A distinction, however, is taken in this respect between marine policies and insurances of houses against fire. It would probably be allowed that, if during war there were a policy on a merchant ship described as carrying ten guns, and employed in the coal trade, and, after the policy was effected, the owner should reduce her armament to five guns, or load her with oil of vitriol, the underwriter would not be liable for a subsequent loss.

But it is strenuously asserted, that if there be an insurance against fire upon a house, which is described in the policy as being of a particular specified description, and in which it is stated that the occu-

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pier carries on a certain specified trade — this being true at the date of the policy, the assured, preserving the identity of the house, may alter its construction, so as to render it more exposed to fire, and may carry on in it a different and more dangerous trade, without prejudice to the right to recover for a subsequent loss by fire, the warranty extending only to the state and use of the premises at the moment when the policy was signed. This seems quite contrary to the principles on which contracts are regulated. The construction and use of the premises insured, as described in the policy, constitute the basis of the insurance, and determine the amount of the premium. But this calculation can only be made upon the supposition that the description in the policy shall remain substantially true while the risk is running, and that no alteration shall subsequently be made by the assured to enhance the liability of the insurer. It seems strange, then, that if a house be described in the policy as occupied by the owner, carrying on the trade of a butcher, so that the premium is on the lowest scale, he may immediately afterwards, merely taking care that the walls and floors and roof remain, so that it is still the same identical house, convert it into a manufactory for fireworks, a trade trebly hazardous, for which the highest scale of premium would be no more than a reasonable consideration for the stipulated indemnity.

We are told, however, that this doctrine is established by decisions binding upon us. The first of these is, *Shaw v. Robberds*, 6 Ad. & El. 75; 1 Nev. & P. 279. The plaintiff insured premises against fire by the description of, "a granary and a kiln for drying corn in use." By the conditions of insurance the policy was to be forfeited, unless the buildings were accurately described, and the trades carried on therein specified; and, if any alteration were made in the building, or the risk of fire increased, the alteration was to be notified, and allowed, by indorsement, on the policy, otherwise the insurance to be void. The plaintiff carried on no trade in the kiln, except drying corn; but, on one occasion, he allowed the owner of some bark, which had been wetted, to dry it gratuitously in the kiln, and this occasioned a fire, by which the premises were destroyed. Drying bark was proved to be a distinct trade from drying corn, and more hazardous, insurance offices charging a higher premium for barkkilns than cornkilns. Held, that the plaintiff was entitled to recover. But, what was the *ratio decidendi*? Lord Denman, C. J. (6 Ad. & El. 82; 1 Nev. & P. 286): "If the plaintiff had either dropped his business of corn-drying, and taken up that of bark-drying, or added the latter to the former, no doubt the case would have been within the condition relied upon. Perhaps, if he had made any charge for drying the bark, it might have been a question for the jury, whether he had done so as a matter of business, and whether he had not thereby, although it was the first instance of bark-drying, made an alteration in his business, within the meaning of that condition. But, according to the evidence, we are clearly of opinion that no such question arose for the consideration of the jury." The court there intimates an opinion, that there was no implied warranty that nothing besides corn

should ever be dried in the kiln, but gave no countenance to the doctrine, that another and more dangerous trade could be carried on in the kiln, without vitiating the policy. The other case, which was more confidently relied upon, and, on account of some expressions of some of the judges, not without reason, was *Pim v. Reid*, 6 Scott's N. R. 982; 6 Man. & G. 1; but, when examined, we do not think it is an authority for the doctrine which it is cited to support. The insurance there was upon a manufactory, engine-house, and machinery, against fire, and the policy contained conditions resembling those in *Shaw v. Robberds*—among others, "that if the assured should omit to communicate to the insurance office any circumstances, material to be made known, to enable the company to judge of the risk they had undertaken, or were required to undertake, the insurance should be of no force." There were pleas on these conditions, alleging that the assured carried on a more dangerous trade than that specified in the policy, which was a circumstance material to be made known, and had omitted to communicate it to the office, the non-communication being made the infraction relied upon, and the gist of the pleas. The issues on these pleas were found for the defendant, but there was a rule for judgment for the plaintiff, *non obstante veredicto*, which was made absolute. The pleas were considered bad for not showing that a reasonable time had elapsed for giving notice, and on this defect alone Coltman, J., rested his judgment. The other judges do make use of some observations as if under this policy the assured might change his trade to one more dangerous than that described at the time of making the policy; but, these observations appear to have reference to the necessity for giving notice for the particular purpose specified in the conditions on which the pleas were founded. Tindal, C. J., says, 6 Scott's N. R. 1005; 6 Man. & G. 20: "How can an alteration, which takes place in the enjoyment of the premises after the execution of the policy, be a circumstance material to be made known to the company, in order to enable them to judge of the risk they have undertaken?" And Maule, J., observes, 6 Scott's N. R. 1009: "The time at which the company are to exercise their judgment, is not the time at which the communication is to be made." Therefore, this case cannot be considered an authority for the doctrine sought to be established; and, if it were, we could not concur in it, for the doctrine appears to us to be contrary to the ruling of Lord Tenterden, in *Dobson v. Sotheby*, Moo. & M. 90. There the insurance was on premises against fire, "where," according to the statement in the policy, "no fire is kept and no hazardous goods are deposited." The loss happened in consequence of the making a fire, and burning a tar-barrel on the premises, for the purpose of repairing them. The plaintiff was held entitled to recover; but, Lord Tenterden said, that if there had been any misdescription of the property insured, the defendants certainly were not liable; and added: "I think that the condition must be understood as forbidding only the habitual use of fire, or the ordinary deposit of hazardous goods, not their occasional introduction, as in this case, for a temporary purpose connected with

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the occupation of the premises. . . . I cannot, therefore, be of opinion that the policy in this case was forfeited."

Now, assuming the law to be, that, upon an insurance against fire, there is an implied engagement, that the assured will not afterwards alter the premises so as that they shall not agree with the description of them in the policy, and so that thereby the risk and liability of the insurer shall be increased, we have only to consider whether, in this instance, the assured have not done so by converting the house insured from "a house composed of two stories," into a house composed of three stories; and, this really admits of no reasonable doubt. Mr. Bramwell very candidly admitted, that if the policy remained in force after the alteration, it covered the third story, as well as the other two. This being so, the increase of the area of the building by a third story, must be considered by the court to have necessarily increased the hazard or probability of fire about as much as if the addition to the house had been lateral instead of vertical.

But, there is another consideration which is quite decisive to show that by the alteration the liability of the insurer is increased, and that his premium, if previously fair, has now become inadequate. Upon an insurance of a house against fire, the insurer must make good the whole of any partial loss, the owner not being considered to stand his own insurer for the excess of the value of the house beyond the sum for which the insurance is effected. The value of the additional property, here sought to be covered by the insurance, must be taken to be 1,000*l.*, and for the whole of this, or any part of it, the defendant is now liable to the full amount of the sum for which he has subscribed the policy, till he has paid 1,600*l.*, *plus* his liability to this amount for the destruction of any part of the original house, valued at 4,000*l.* We are of opinion that this additional liability could not be thrown upon him without any consideration, and against his consent, by the act of the assured in altering the house so as to make it no longer correspond with the description of the house in the policy. If the liability cannot be carried to this extent, it is entirely gone, and, therefore, we pronounce judgment for the defendant.

*Judgment for the defendant.*¹

¹ That papers, or writings, not included in the body of a policy, may be made a part of it, and govern it as much as if so included, has been repeatedly recognized in America. See *Snyder v. Farmers' Ins. and Loan Co.* 16 Wendell, 92; *Burrill v. Saratoga County Mutual Ins. Co.* 5 Hill, 188; *French v. Chenango County Mut. Ins. Co.* 7 Hill, 122; *Delonguemare v. Tradesmen Ins. Co.* 2 Hall, 589.

In America, the effect of the enlargement or alteration of a house was much discussed in the case of *Stetson v Massachusetts Mutual Fire Ins. Co.* 4 Mass. R. 330, where it was said to be a question of fact for the jury, whether the alteration did, or did not increase the risk. See also, *Curry v. Commonwealth Insurance Co.* 10 Pick. 535.

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BROWN v. BYRNE.

May 26, 1854.

*Evidence — Written Contract — Usage of Trade — Bill of Lading —
Action for Freight — Deduction of Discount.*

In an action for freight by a ship-owner against the indorsee of a bill of lading, to whom goods had been delivered at L., and who had accepted them, the bill of lading making them deliverable, "he paying freight for them five eighths of a penny sterling per pound, with 5*l.* per cent. primage and average accustomed : " —

Held, that evidence was admissible that by the custom of L. the plaintiff was entitled to a deduction of three months' discount from the freight ; though such custom applied only to goods coming from certain ports in the southern states of America.

THIS was an action to recover the amount of freight and primage on a shipment of cotton from New Orleans. By consent and a judge's order, the following case was stated for the opinion of this court, under section 46 of statute 15 & 16 Vict. c. 76 : The plaintiff is a ship-owner in Liverpool. The defendant is a merchant there, carrying on business under the firm of " A. E. Byrne and Co." On the 5th of October, 1853, Messrs. J. B. Byrne and Co., of New Orleans, shipped on board the ship *Courier*, a vessel belonging to the plaintiff, 110 bales of cotton, for which the master signed a bill of lading, of which the following is a copy : —

" Shipped, in good order and well conditioned, by J. B. Byrne and Co., on board the ship called *The Courier*, whereof Gemmell is master, now lying at the port of New Orleans, and bound for Liverpool, namely, 110 bales of cotton, being marked and numbered as in the margin, and are to be delivered in the like order and condition at the aforesaid port of Liverpool, (the dangers of the sea only excepted,) unto order or to assigns, he or they paying freight for the said goods five eighths of a penny sterling per pound, with 5*l.* per cent. primage and average accustomed. In witness whereof the master or purser of the said vessel hath affirmed to four bills of lading, all of this tenor and date, one of which being accomplished, the others to stand void. Dated in New Orleans, the 5th day of October, 1853.

" JOHN GEMMELL."

This bill of lading was forwarded to the defendant, indorsed to him. On the arrival of the vessel at Liverpool, in February, last, the defendant claimed and received the 110 bales of cotton, as indorsee and holder of the said bill of lading. On the cargo being delivered, the following debit note was rendered to the defendant for the freight : —

" Messrs. A. E. Byrne and Co.

" To owners of *The Courier*,

Drs.

For freight per said vessel from New Orleans —	£138	11	3
On 110 bales cotton, weighing 53,209 lbs. at $\frac{1}{2}d.$		6	18
Primage, 5 <i>l.</i> per cent.			7
	£145	9	10

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The defendant has offered to pay 143*l.* 13*s.* 7*d.*, on account of the freight, but he refuses to pay the balance, 1*l.* 16*s.* 3*d.*, on the ground that, by the custom of Liverpool, he is entitled to a deduction of three months' discount from the freight. It is admitted that, according to the usual custom prevailing amongst merchants and ship-owners in Liverpool, three months' interest or discount is deducted from the freights payable under bills of lading, on goods coming from certain ports in the southern states of America, namely, New Orleans, Mobile, Charleston, and Savannah, whether such freights are paid by the shippers, the consignees named in the bill of lading, or by the assignees of the bill of lading. The custom does not entitle the merchant to three months', or any credit for freights, which are always due on delivery; nor does it extend to the northern American ports, or to Apalachicola, in the south, freights from those ports being always payable in cash, without any deduction. The plaintiff contends that the custom is not good in law, being inconsistent with the written document. The court is to be at liberty to draw any inference of fact which a jury might draw. The questions for the court are, whether the custom to deduct three months' discount from freights, is good in law, and whether the plaintiff is, under the circumstances of the case, entitled to recover the said sum of 1*l.* 16*s.* 3*d.* from the defendant. The case was argued at the Sittings after Easter term,¹ by

Mellish, for the plaintiff. First, as between the parties to the bill of lading, evidence of a custom to diminish the amount of freight named in the bill of lading by deducting discount, is not admissible. Evidence of custom to interpret words when they are used in an artificial sense, different from the ordinary one, is admissible; also, to annex incidents as to which the contract is silent, provided they are consistent with the contract. Parke, B., in *Hutton v. Warren*, 1 M. & W. 466, 474. But this custom does not affect to interpret words which are used in the bill of lading, in an artificial sense; also, as the custom does not extend to all ports, the words "paying freight," would have a different meaning, according as the goods were shipped from one port or from another. Further: the bill of lading, in effect, states that a specific sum is to be paid for freight; therefore, if the custom is admitted, the plaintiff will not have all that the written contract gives him; and a custom, according to which, the defendant will pay 143*l.* 13*s.* 7*d.*, instead of 145*l.* 9*s.* 10*d.*, is inconsistent with the contract; it is usual to insert in bills of lading, the words: "with customary allowances." In *Syers v. Jonas*, 2 Exch. 111, the court held that evidence was admissible to show that, by established usage in the tobacco trade, all sales were by sample, because that incident was not expressly or impliedly excluded by the written instrument. In *Bold v. Rayner*, 1 M. & W. 343, there was really no difference between the bought and sold notes, and evidence of mercantile usage

¹ May 12, before COLERIDGE, J., WIGHTMAN, J., ERLE, J., and CROMPTON, J.

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was admitted to show that. In the note to *Wigglesworth v. Dallison*, 1 Smith's L. C. 308, c. 309, 3d ed., it is said: "However, evidence of usage, though sometimes admissible to add to or explain, is never so to vary or to contradict, either expressly or by implication, the terms of a written instrument;" and *Yates v. Pym*, 6 Taunt. 445, is cited.

[ERLE, J. In that case, the court undertook to say that the term used in the contract, did not mean what all contractors in the trade of bacon understood that it did mean.]

In *Spartali v. Benecke*, 10 C. B. 212, Wilde, C. J., after adverting to the rules relating to the admissibility of evidence of the usages of trade, said: "Both these rules are subject to the limitation or qualification that the peculiar sense or meaning which it is proposed by the evidence to attach to the words of the contract, must not vary or contradict, either expressly or by implication, the terms of the written instrument;" and in that case, though the time of the delivery of the goods was not expressed in the contract, evidence of a usage in the particular trade, that vendors were not bound to deliver the goods without payment, was held to be not admissible, because it would have annexed an incident to the subject-matter which was impliedly excluded by the contract. In *Blackett v. The Royal Exchange Assurance Company*, 2 Cr. & J. 244; 2 Tyr. 266, which was on a policy of insurance, Lord Lyndhurst said, 2 Cr. & J. 249: "Usage may be admissible to explain what is doubtful; it is never admissible to contradict what is plain." In *Trueman v. Loder*, 11 Ad. & El. 589, 597, 598; Lord Denman, C. J., comments on the inconvenience of admitting parol evidence as explanatory of written contracts. In *Ford v. Yates*, 2 Man. & G. 549; 2 Scott's N. R. 645, evidence was held not admissible to show that by the usual course of dealing between the parties, the crops were sold on a credit of six months.

[COLERIDGE, J. The course of dealing is matter of contract, and so is different from a custom of trade. That case is cited in 1 Smith's L. C. 309, 3d edition, as an authority for the following position: "Evidence of previous usage between the parties to a contract, may be admitted with the same effect, but subject, of course, to the same restrictions, as a general usage of trade."]

Secondly, the ship-owner had a lien on the cargo for the full amount of the freight, payable by the party named in the bill of lading: if he delivers the goods there is an implied promise by the assignee, in consideration of the lien being given up, to pay that amount of freight.

Blackburn, contra. First, wherever the limit as to the admissibility of evidence of usage is drawn, this case will be within it. There is no difference in this respect between a contract by word of mouth and a written contract. *Ford v. Yates*, 2 Man. & G. 549; 2 Scott's N. R. 645, decides that the written record of the contract is not to be varied by evidence of the intention of the parties. But the general law, and the *lex loci* or local usage, and the law affecting a particular trade or class, are tacitly incorporated in every contract,

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according to the rule of the civil law, "*Quæ more et consuetudine sunt, tacite insunt.*" Also local terms may be explained by parol evidence; and in mercantile transactions evidence of established usage is admissible to a greater extent than in other contracts. Parke, B., in *Syers v. Jonas*, 2 Exch. 111, 116. The words used in this contract do not show an intention to exclude the custom of trade. I should contend, that if the sum of 145*l.* 9*s.* 10*d.* had been inserted, the evidence would be admissible; though if the words "cash in full" had been written, it would have been excluded. The custom of trade is to be incorporated in the contract, unless it is expressly or impliedly excluded. "Paying freight," which is a mercantile term, may mean "settling by deduction of discount," or "making usual deductions and allowances." Erle, J., in *Gaskill v. Skene*, 14 Q. B. 664, 671. He also cited *Turney v. Dodwell*, 2 El. & Bl. 136; s. c. 24 Eng. Rep. 92, on statute 9 Geo. 4, c. 14, s. 1. What Lord Denman said in *Trueman v. Loder*, 11 Ad. & El. 597, 598, proceeded on a misapprehension as to the uncertainty of evidence of usage; and he went so far as to regret that evidence of custom was admissible at all, as Lord Eldon did in *Anderson v. Pilcher*, 2 B. & P. 168.¹ In *Spartali v. Benecke*, 10 C. B. 212, the court were of opinion that the words of the contract expressly excluded the custom. In *Syers v. Jonas*, 2 Exch. 111, the written contract was to deliver out of a particular cargo, and the court held, that evidence of a custom to consider sales as always by sample was not excluded, though it introduced an essential difference in carrying out the contract, and so varied the contract. The decision in *Blackett v. The Royal Exchange Assurance Company*, 2 Cr. & J. 244; 2 Tyr. 266, cannot be reconciled with *Syers v. Jonas*. He also cited *Cochran v. Retberg*, 3 Esp. 121. In *Bold v. Rayner*, 1 M. & W. 343, evidence of a custom which would increase the amount of goods to be delivered was admitted; in this case the custom diminishes the price to be paid; the result in both cases is the same. In *Grant v. Maddox*, 15 M. & W. 737, the custom introduced a deduction from the period of service, and varied the ordinary acceptation of the word in the contract, which was not a word of art. In *David v. Butterworth*, 1 Exch. 425, Parke, B., and Rolfe, B., held, that the party, though he had not himself knowledge of the custom, must be taken to have given his agent authority to deal according to it.

[CROMPTON, J., referred to *Sutton v. Tatham*, 10 Ad. & El. 27.]

Secondly, the assignee of the bill of lading is not a party to it, or to any written contract: and the contract to be inferred from his receiving the goods is to pay what is customary *de facto*, whether or not technical rules prevent parties to the bill of lading from enforcing the custom. *Sanders v. Vauzeller*, 4 Q. B. 260, 294, 295.

[CROMPTON, J. The assignee takes under the bill of lading.]

¹ In *Lethulier's case*, 2 Salk. 443, Holt, C. J., said: "We take notice of the laws of merchants that are general, not of those that are particular usages."

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ERLE, J. Unless the defendant's offer of payment is sufficient, parties who have settled with allowances are subject to an action to recover the difference.

COLERIDGE, J. We think that there cannot be a different rule for the consignee and the assignee of the bill of lading.]

Mellish, in reply. If the rule be, that the custom of trade binds unless expressly or impliedly excluded, there will be no limit to the admissibility of evidence of custom.

[ERLE, J. There is not a case in the books in which the admission of evidence of the usage of trade had not the effect of varying the contract.]

If evidence of this custom is admitted, no custom will be excluded, *Cochran v. Retberg*, 3 Esp. 121, and *Grant v. Maddox*, 15 M. & W. 737, Alderson, B., and Rolfe, B., were cases in which the term "day" and "year" were interpreted according to the custom of the particular trade: in the latter case, the party could only serve while the theatre was open; and Alderson, B., and Rolfe, B., expressed their adherence to the rule, that parol evidence could not be received to alter a written contract.

Cur. adv. vult.

COLERIDGE, J., now delivered the judgment of the court. This was a special case, extremely well argued, before my brothers Wightman, Erle, and Crompton, and myself, at the sittings after last term, by Mr. Mellish and Mr. Blackburn, and the question for decision is shortly this — whether, in an action by a ship-owner against the indorsee of a bill of lading, to whom goods have been delivered at Liverpool, and who has accepted them, the bill of lading making them deliverable, "he paying freight for them five eighths of a penny sterling per pound, with 5*l*. per cent. primage and average accustomed," the latter may lawfully claim to retain, for 138*l*. 11*s*. 3*d*., the amount of the freight at the rate specified, 1*l*. 16*s*. 3*d*., on the ground that, by the custom of Liverpool, he is entitled to a deduction of three months' discount from the freight. It is admitted that the custom exists in fact, in regard of shipments from New Orleans, and some other ports in the southern states of the American union, to Liverpool; but it is objected to as bad in law, because it is inconsistent with the written document, the bill of lading. Five eighths of a penny on the weight of the cargo is, it is said, equal to 138*l*. 11*s*. 3*d*.; the bill must be read as if that sum were specified in it, and this custom, if allowed, will change it to 136*l*. 15*s*.

The principles on which this case is to be decided are perfectly clear; the difficulty lies in the application of them to the facts. Mercantile contracts are very commonly framed in a language intelligible to merchants. The intention of the parties, though perfectly well known to themselves, would often be defeated if the instrument were strictly construed according to its ordinary import. It is a rule of law, therefore, that such contracts are to be construed according to the mercantile custom and usage, and not according to the strict meaning of the words used, in order to expound it, and arrive at its true meaning.

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in all contracts, as to the subject-matter of which known usages prevail, parties are found to proceed with the tacit assumption of these usages; they commonly reduce into writing the special particulars of their agreement, but omit to specify the known usages, which are included, however, as of course, by mutual understanding. Evidence, therefore, of such incidents is receivable. The contract, in truth, is partly express and in writing, partly implied or understood and unwritten. But in both these cases, a restriction is established on the soundest principle, in that the evidence received must not be of a particular which is repugnant to or inconsistent with the written contract. Merely that it varies the apparent contract is not enough to exclude the evidence, for it is impossible to add any material incident to the written terms of a contract without altering its effect more or less. Neither in the construction of a contract among merchants, tradesmen, or others will the evidence be excluded because the words are in their ordinary meaning unambiguous, for the principle of admission is, that words perfectly unambiguous in their ordinary meaning are used by the contractors in a different sense from that. What words more plain than "a thousand," "a week," "a day?" yet the cases are familiar in which "a thousand" has been held to mean twelve hundred, *Smith v. Wilson*, 3 B. & Ad. 738; "a week," a week only during the theatrical season, *Grant v. Maddox*, 15 M. & W. 737; "a day," a working day, *Cochran v. Retberg*, 3 Esp. 121. In such cases the evidence neither adds to, nor qualifies, nor contradicts the written contract; it only ascertains it by expounding the language.

Here the contract is to pay freight on delivery at a certain rate per pound: is it inconsistent with this to allege that, by the custom, the ship-owner, on payment, is bound to allow three months' discount? We think not. The written contract expressly settles the rate of payment: the custom does not set this aside; indeed, it adopts it, as that upon which it is to act, by establishing a claim for allowance of discount upon freight, to be paid after that rate. The consignee undertakes to pay freight, on delivery, after that rate. The ship-owner undertakes to allow three months' discount on freight paid after that rate. The latter contract is dependent on the former, but is not repugnant to it. If the bill of lading had expressed, or if, from the language of it, the intention of the parties could have been collected, that the freight at the specified rate should be paid free from all deductions, customary or otherwise, then it would have been repugnant to it to set up the custom, and the case would have been brought within the restriction mentioned above.

Webb v. Plummer, 2 B. & Al. 746, and *Hutton v. Warren*, 1 M. & W. 466, are cases which illustrate this principle. In the first of these, by the custom of the country, the outgoing tenant was bound to do certain acts, and entitled to receive certain compensation, but the lease, which formed the written contract, bound him to do the same acts in substance, and specially provided for his payment as to some of them, omitting the other; and the court held that the expression, "as to some," excluded the implication as to the remainder, and that the language of the lease was equivalent to a stipulation, that the

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lessor should pay for the things mentioned, and no more. The custom, therefore, would have been repugnant to the contract. But, in the latter case, in which the former was expressly recognized, the court held, that a specific provision as to a matter dehors the custom, left the custom untouched and in full force.

This latter case appears to us like the present: the contract settles the rate of freight. Whether or not discount is to be allowed on the payment, it leaves open; and to that the custom applies.

Our determination on this point makes it unnecessary to say anything as to a difference, which was contended for by the defendant, between the original shipper and the indorsee of the bill of lading.

We are of opinion that judgment should be entered for the defendant.

Judgment for defendant.

. C A S E S

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS;

AND UPON

WRITS OF ERROR FROM THAT COURT TO THE EXCHEQUER CHAMBER,

DURING THE YEAR 1854.

HOPKINS v. TANQUERAY.

May 26, 1854.

Sale by Auction—Warranty—Representation when not Warranty.

The defendant, having sent his horse to Tattersall's to be sold by auction, on the day previous to the sale saw the plaintiff (with whom he was acquainted) examining the horse, and said to him, *bonâ fide*, "You have nothing to look for, I assure you; he is sound in every respect;" to which the plaintiff replied, "If you say so, I am satisfied," and desisted from his examination. The horse was put up the next day to auction, without a warranty, and the plaintiff bought him, being induced, as he said, by the defendant's assurance of soundness:—

Held, in an action for a breach of warranty, that there was no evidence to go to the jury of a warranty, the representation not being made in the course of or with reference to the sale.

If a private warranty, with a view to the sale by auction, be given to an individual by the owner of goods, which are afterwards put up to auction without a warranty, and the person to whom the warranty is given either bids for or buys them.

Quære, whether the transaction is either legal or valid between the parties?

DECLARATION, that the defendant, by representing and warranting a horse to be then sound, sold the said horse to the plaintiff; yet the horse was not then sound; and, by reason of the premises, the plaintiff had been put to great expenses in feeding, and taking care of, and

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reselling the said horse, and has lost, and been deprived of, the use of the said horse, and of the moneys paid by him as the price of the said horse, and has been otherwise damaged, and the plaintiff claims 300*l*. Pleas: first, not guilty; secondly, that the horse was sound at the time of making the promise alleged. The cause was tried before Talfourd, J., at the sittings at Westminster, after Hilary term, when it appeared from the plaintiff's evidence, *inter alia*, that the plaintiff and defendant had been acquainted for some time, and that the defendant, in May, 1853, was about to sell his stud, (amongst which was a horse named "California," the subject of the present action.) The horses were accordingly sent to Tattersall's, and were advertised for sale on Monday, the 30th May. On the previous day, Sunday, the 29th May, the plaintiff, having previously had some conversation with the defendant about the horse "California," went to Tattersall's, and, after some words with the defendant, proceeded to the stable in which the defendant's horses all were, and while he was on his knees examining "California," the defendant came in, and observing the plaintiff, said: "You have nothing to look for; I assure you he is perfectly sound in every respect;" upon which the plaintiff replied: "If you say so, I am satisfied;" and thereupon desisted from his examination. The horse was put up the next day, Monday, the 30th, to auction, without a warranty, and the plaintiff bought him for 280 guineas, "having made up my mind," as he said, "to buy him, when I had the plaintiff's positive assurance of soundness." The horse, two or three weeks subsequently, on being sent into training to run a match, was declared unsound, having an enlargement of the suspensory ligament of the near fore leg, as the plaintiff's witnesses maintained. There was contradictory evidence on this point, as well as to what the defendant had said on the Sunday; and it also appeared in evidence, though the defendant denied it, that in the course of an attempt which had been made to settle the matter by arbitration, the defendant had said that he believed the horse to be sound when he sold it, that the price amounted to a warranty, and that he apprehended he had said enough to constitute a warranty. The horse had been resold by the plaintiff for 144 guineas, and this action was brought to recover the difference. The learned judge left it to the jury to say, whether there was a contract of warranty embodied in the sale, and whether the horse was sound when sold. The jury found the first in the affirmative, and the second in the negative, and a verdict was taken for the plaintiff for 132*l*. 16*s*. leave being reserved to the defendant to move to enter a nonsuit, if the court should be of opinion that, under the circumstances, no warranty could be inferred.

April 22. *Lush*, obtained a rule *nisi* accordingly, and for a new trial, on the ground that the verdict as to soundness was against the evidence; against which,

May 26. *Byles*, Sergt., and *Finlason*, showed cause. The first question is, in effect, was there any evidence of a warranty to go

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the jury? The plaintiff submits that there was ample evidence. The evidence as to what the defendant actually said was somewhat contradictory, but after the jury's finding, we must take the plaintiff's version to be the true one, and it is submitted that what he represents the defendant to have said is quite sufficient to amount to a warranty.

In *Cave v. Coleman*, 3 Man. & R. 2, it was held, that a verbal representation by the seller to the buyer in the course of dealing, that he "may depend upon it, the horse is perfectly quiet and free from vice," was a warranty; and Lord Tenterden, in that case, says: "I think that the proof of warranty was sufficient to support the declaration. There was a very sufficient warranty, though the word 'warrant' was not used." A mere representation, by the seller, that the horse is sound, is quite sufficient. *Salmon v. Ward*, 2 Car. & P. 211, was an action on the warranty of a horse, and letters had passed between the plaintiff and the defendant, in which the plaintiff said: "You well remember that you represented the horse to me as a five year old;" and the defendant replied: "The horse is as I represented it;" and Best, C.J., on this evidence, says: "The question is, whether I and the jury can collect that a warranty took place. . . . No particular words are necessary to constitute a warranty. If a man says, 'This horse is sound,' that is a warranty." So, in *Wood v. Smith*, 5 Man. & R. 124, where the vendor had said: "I believe the mare to be sound, but I will not warrant her," it was held, that the vendee might maintain an action of *assumpsit*, as upon a warranty that the mare is sound to the best of the vendor's knowledge. So, we do not rely in the present case on "the *scienter*," which is unnecessary to be charged or proved in an action for the breach of warranty. *Williamson v. Allison*, 2 East, 446.

[MAULE, J. The only question is, at what time the representation, which is said to constitute the warranty, takes place. A representation may be made before the contract begins. You cannot incorporate any thing into the contract which occurs before that "talking," which takes place between the parties, and itself constitutes the contract. The representation, in order to amount to a warranty, must take place after the sale began, and before it is ended. Now, when did the sale begin here? The actual sale was by auction, the next day, without a warranty.]

JERVIS, C. J. The representation is clearly a warranty only, if made with a view to a contract.]

In *Lysney v. Selby*, 2 Ld. Raym. 1118, it was held, that an action would lie against the seller for affirming the rents of an estate were more than they really were, if the buyer purchases on the strength of that affirmation, though it was made before the sale. Now, here the plaintiff says, he was induced to buy the horse from the defendant's assurance of soundness. In *Lysney v. Selby*, Holt, C. J., says: "As to the *warrantizando vendidit*, that will be so, though the warranty be before the sale;" and, in *Pasley v. Freeman*, 3 T. R. 59, Buller, J., says: "If the warranty be made at the time of the sale, or before the sale, and the sale is on the faith of the warranty, I can see no dis-

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inction between the cases." It may be said, that, *non constat*, when the defendant made the representation, that the plaintiff would become the purchaser; but, in *The Fishmongers' Company v. Robertson*, 5 Man. & G. 176, Maule, J., says: "There is a large class of cases mentioned by Pothier, where one party, A, promises to do something, if another party, B, will do something else. This contract is not binding on B, but, if he does the act, then it becomes binding on A." Applying that principle to the present case, the representation was not binding on the Sunday; but, when the plaintiff buys, then it becomes binding. At all events, the evidence ought to be left to the jury; it was for them to say, whether this representation was part of the contract or no. Then, it may be said, that may be all very true in the case of a sale by private contract; but, here the sale was by public auction, and you cannot import into that contract a private warranty given to one of the bidders. But, *Bartlett v. Purnell*, 4 Ad. & El. 792, shows that an agreement between the owner of goods, to be sold at an auction, and an individual, made before the sale, unknown to the auctioneer, if made with the view to that person becoming a purchaser, may be binding on the owner.

[CRESSWELL, J. There would be some difficulty if the auctioneer had sued.

MAULE, J. There is a very grave question — assuming the defendant here to have actually given a warranty, privately, to the plaintiff, to the effect that, if he should become the purchaser of the horse at the auction, as between him and the defendant, the horse should be taken as warranted — how far this would be a legal transaction, and binding on the parties.]

As between them it would be binding, and third parties would not be affected by it.

[MAULE, J. Not so; there is a strong analogy between the case supposed and that where persons are employed as "chanters," or "mock bidders," which clearly vitiates the sale. Here is a man who is known by many of the persons, present at an auction, to be a good judge of a horse; he bids a large price for a horse, apparently unwarranted, having had a private warranty from the owner — a much larger price than he would have done if he had not had this warranty; other persons, seeing the horse unwarranted, and ignorant of the private warranty, but knowing the bidder's skill and judgment, are induced also to bid more largely. This is something very like "chanting;" the relative position of all parties is very much altered by this private warranty: the person to whom it is given, is safe by reason of it, and bids more largely; and the public is deceived, taking him to be *bonâ fide* bidding on the same footing as themselves. It is well worth the while of persons selling, to consider how far they may be acting legally in giving a private warranty to an individual.]

That is certainly a new view of the subject, which was not at all suggested at the trial, and cannot now be used to upset the verdict. It was a simple question for the jury, whether the defendant's representation was given and taken as a warranty. *Moyens v. Heyworth*, 10 M. & W. 147; *Shepherd v. Kain*, 5 B. & Al. 241; *Power v. Bar-*

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ham, 4 Ad. & El. 473. [They then proceeded to argue, that the evidence as to the unsoundness, fully supported the verdict of the jury.]

James, Q. C., and *Lush*, in support of the rule, were not called on.

JERVIS, C. J. I am of opinion that the rule must be made absolute on the first point, namely, to enter a nonsuit. The case has been argued with much subtlety, and a discussion raised on points about which there is really no doubt, and which are well established, but which, however, have no conclusive bearing on the subject in dispute. There is no doubt that, in order to make a warranty, it is not necessary that the word "warrant," or "promise," should be made use of in the bargain, as was held in *Cave v. Coleman*. Again: it is not necessary that the words or allegations, which are to form the warranty, should have been simultaneous with the completion of the bargain. It is sufficient if they were used during the negotiation, and in the course of the dealing; and, it is unimportant whether they were used at the very moment of the sale or not; and the reported cases do not militate against this. It is said, however, that if there is a private agreement previously, it makes no difference as to the terms of it, that there is subsequently an actual sale by auction; and *Bartlett v. Purnell* was cited as an authority for this. But, that case, when examined, by no means establishes this. There, there was a collateral bargain between the owner of the goods and the person who became subsequently the purchaser at the sale by auction; but, that bargain did not alter the character of the article sold, or the terms on which it was sold; the only effect of it was, that the party purchasing had a right to say, as against the owner, that the price was to be set off against the debt due from the owner to him. If the auctioneer had been the party suing, it might have been a different question; though, probably, as the agent of both parties, he would have been bound by the equities existing between them. But, it is clear that the private bargain in no way altered the character of the sale. Again: it is not necessary to consider whether, if there had been a warranty between the defendant and the plaintiff in this case, the contract would have been legal under the circumstances; though, as pointed out by my brother Maule, in the course of the argument, it would be open to much question, inasmuch as the fact of one of the bidders having a warranty, and the others not, would alter the relative position of the parties, their inducement to bid, and the whole character of the sale. But, it is unnecessary to give an opinion on that, as I think that what occurred between the plaintiff and the defendant, before the sale, only amounted to a representation, on the part of the defendant, as distinguished from a warranty. The circumstances are shortly these: The defendant sees the plaintiff, on the Sunday previous to the day of sale, on his knees, in the stable, examining the horse in question, and says to him: "The animal is all right," or "perfectly sound;" on which the plaintiff replies: "If you say that, I am perfectly satisfied," — satisfied, that is, with the representation of the defendant, whom he knows to be an honorable man; and he, ac-

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cordingly, does not have the horse examined by a veterinary surgeon. It is clear, also, that the defendant, according to his judgment and belief, thought the horse sound. Nor is the gist of the action fraud; indeed, it has been expressly disclaimed by the plaintiff's counsel. The horse is then sold, the next day, without a warranty. It seems to me clear that the defendant merely made a representation of what he *bonâ fide* believed, and that the plaintiff so understood it. What passed subsequently does not affect the question, because it amounts to no more than this—taking it for granted that the defendant did say what he is represented to have said, it was understood by all that in point of law or fact it amounted to a warranty, which was erroneous. I think, therefore, that the rule must be made absolute.

MAULE, J. I concur in thinking that the rule to enter a nonsuit, must be absolute, for I think that there was no evidence to go to the jury on the point which the plaintiff had to make out, namely, that the horse was sold with a warranty. That there was no warranty given at the time of the sale, is clear beyond a doubt, and that all persons so understood; for when nothing is said by the auctioneer as to warranty, the horse is taken as sold unwarranted. But it is said, that, as between the plaintiff and defendant, though not as to the public in general, you can import a warranty, of which there was evidence for the jury. That is in relation to what took place on the Sunday. The plaintiff and defendant were both at Tattersall's on the Sunday; the plaintiff kneels down to examine the horse, and the defendant says: "You need not examine him; he is perfectly sound, I assure you, in every respect." The plaintiff replies: "If you say so, I am perfectly satisfied." Now, is that evidence to show that the plaintiff and defendant understood that they were then making a bargain, as set up by the plaintiff—that is, that in point of fact, if the horse proved not sound, the defendant should be held liable? I think there is not the smallest ground from which the jury could infer that. The other evidence in the case, as to what passed subsequently, only shows that the parties themselves, and others, attached to the word "warranty," a different sense than accurately belongs to it in the English language. One witness was even of opinion that the price made a warranty. I think that what occurred, amounted to no more than a representation on the part of the defendant. The plaintiff believing, and justly so, that the defendant was a person of veracity, and also of skill about horses, being himself about to examine the horse, is prevented by the defendant saying: "I do assure you, I find nothing at all to interfere with his being sound," or, "I have examined him, and find him sound." If, indeed, this representation had been falsely and fraudulently made, to induce the plaintiff to buy, no doubt it would be a good cause of action; but here *mala fides* is neither imputed, nor, indeed, is there any pretence that it existed. The defendant meant no more than that, in his opinion, formed on knowledge and examination, the horse was perfectly sound, and that, therefore, the plaintiff need not examine him; and there is nothing to show that this conversation could be intended to subject

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the defendant to the loss of his bargain in the event of the horse turning out unsound; and the fact of this being said between two persons, both of whom were aware that the horse was to be sold, not by a private negotiation begun and completed between them, but by a public auction, is a strong reason for inferring that those persons themselves did not intend what passed between them to be part of the transaction — part of the contract of sale. In fact, what the defendant said was a mere representation, having no binding effect, unless fraudulent, which is here not imputed. I think, therefore, that there was no evidence for the jury, that the horse was sold with a warranty. The consequence would be, that there must have been a new trial, had not leave been reserved to enter a nonsuit in the event of the court being of opinion that there was no evidence. I shall add nothing now to what I threw out in the course of the argument, as to the legality of such a warranty as is here set up by the plaintiff; but the point is well worthy of consideration, whether such a transaction would be legal. I give no judgment on the point.

CRESSWELL, J. I am of the same opinion. I think that there was no evidence to go to the jury of a warranty. The contract of sale took place at Tattersall's on the Monday, between the auctioneer and the public; and the contract, as far as that, was clearly a contract without a warranty. Is there any thing, then, to show that the parties themselves intended that the terms on which the horse should be offered to the plaintiff, should be different from those on which he was to be offered to the public? All that can be inferred, if any thing at all, is a representation on the part of the defendant that the horse was sound; and if this had taken place in the course of making the contract, no doubt it might amount to a warranty; but the plaintiff and defendant were not then making a contract, and it was well understood by both that the contract should take place the next day; nor was it intended by them to alter the contract that was to be made the next day; neither party so understood it at the time. As to what passed afterwards, when the defendant said, in effect: "I apprehend I did say that from which a warranty might be inferred," he only meant to say: "I did say the horse was sound, and if I am bound by that, well and good;" not that he had formally made a contract to that effect, which is the proper meaning of "warranty." As to the other point, on the legality of a private warranty on a sale by auction, I give no opinion, as it is unnecessary for the decision of the case.

CROWDER, J. I am of the same opinion. I think the conversation which took place between the plaintiff and the defendant, amounted to a representation merely, and is not to be construed into an intention to warrant. I apprehend, in order to amount to a warranty, the representation must be intended by the parties to form part of the contract. Now, here the sale was to be the next day without a warranty, and there appears nothing to infer an intention to alter that contract. It was, therefore, a representation merely, as distinguished

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from an intention to warrant. It becomes unnecessary to consider the other point, whether a warranty given to one person, and not to all is valid; it may be a very grave question how far such a contract would be supported in a court of justice.

Rule absolute to enter a nonsuit.

FERET v. HILL.

May 27 and 29, 1854.

Landlord and Tenant — Lease — Fraudulent Misrepresentation.

The owner of premises, who grants a lease of them for a term, under which the lessee enters, cannot avoid the lease on the ground that it was obtained by the fraudulent misrepresentations of the lessee as to matter collateral to the lease, e. g. that he was a respectable person, and intended to use the premises for a respectable business; whereas, he was not a respectable man, and intended at the time and did afterwards use the premises for an immoral and illegal purpose.

In such a case, the lessee, having been forcibly evicted by the landlord, brought ejectment, and the court —

Held him entitled to recover, as he was not enforcing an illegal contract, but merely seeking to regain possession of a term, which had become legally vested in him by the lease and entry.

EJECTMENT to recover possession of a second floor, in the house No. 2 Jermyn-street. At the trial, before Crowder, J., at the Sittings for Middlesex, in Easter term, it appeared in evidence that the plaintiff, in February, 1854, applied to the defendant, to whom the house belonged, to let him the second floor, saying it was his intention to carry on the trade of a perfumer. The defendant having asked for a reference, the plaintiff referred him to a Monsieur Pilon, who said that he had known the plaintiff for about four years; that he had dealt with him for perfumery, which he sold again in a private way; and that the plaintiff was a very respectable man. Upon this, the defendant agreed to let the plaintiff the rooms, and a memorandum of agreement was signed by both parties, which, dated the 1st March, 1854, was in the following terms: "Thomas Hill agrees to let, and Pierre Feret agrees to take, the rooms on the second floor, being part of the premises of No. 2 Jermyn-street, St. James's, to have and to hold the said portion of the premises, with the use of the several landlord's fixtures therein, for the term of three months, and to give notice to quit of three months in writing, the year to commence from the 1st March, 1854, at and for the clear yearly rent of 30/., payable quarterly, by equal portions; and it is agreed that the said Pierre Feret shall keep and leave the said premises in tenantable repair, and that the said Thomas Hill shall satisfy and discharge all taxes and rates imposed on the said premises." The defendant, accordingly,

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let the plaintiff into possession, but the latter, instead of carrying on the trade of a perfumer, made use of the apartments as a common brothel. The defendant was informed of this, and gave the plaintiff notice to quit forthwith, and on his not doing so, ejected him by force. Evidence was also received with a view to show that the plaintiff was of a disreputable character, that he had been charged with an indecent assault, and fined for being found in a gaming-house. The learned judge, at the request of the defendant's counsel, left two questions to the jury. First, did the plaintiff intend, at the time when the agreement was entered into, to use the apartments as a brothel? Secondly, was the defendant induced to enter into the agreement by fraudulent misrepresentations as to the plaintiff's character, and as to the purpose for which he intended to use the premises? The jury having found both questions in the affirmative, a verdict was entered for the defendant, with leave to the plaintiff to move to enter it for him, if the court should be of opinion that he was entitled to recover, notwithstanding the finding of the jury.

May 5. *Dawson* obtained a rule *nisi* accordingly, and for a new trial on the ground of the misreception of evidence as to the plaintiff's previous character; against which,

May 27. *Chambers*, Q. C., and *Raymond*, showed cause. With respect to the admissibility of the evidence as to the plaintiff's character, it was given to show that the plaintiff had given a false reference as to his respectability; and, as the defendant had refused to let the premises without a satisfactory reference, the reference given was a fraud on the defendant, to induce him to let to the plaintiff.

[MAULE, J. You say that the plaintiff, knowing those matters, which had occurred in the police court, affecting the respectability of his character, sent the defendant to a person who knew nothing about them, which amounted to a fraud?]

Yes, that is so; it is the converse of the case of *Cornfoot v. Fowke*, 6 M. & W. 358. Then, as to the main question — the right of the plaintiff to recover on this agreement. Now, the defendant had originally a legal interest in the premises, and the plaintiff could only take that from the defendant by setting up this agreement; so, that the *onus* lay on the plaintiff to prove the validity of the agreement. But, the agreement was given under circumstances which, as the defendant contends, made it void.

[MAULE, J. That is to say, void at the election of the defendant, provided he exercised it promptly. You cannot contend that it was absolutely void.]

It was void as against the plaintiff, who is now seeking to enforce it, and the court ought not to assist him.

[JERVIS, C. J. The difficulty is this — the agreement was not void the instant it was executed, but only void at the option of the defendant. If so, then the term passed to the plaintiff.

MAULE, J. Could you, under a plea of *non est factum*, have given evidence of fraud?]

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It must no doubt be fraud, which would go to the root of the contract, so as to make it void *ab initio*. Suppose, both the plaintiff and the defendant had at the time concurred in the contract for an illegal purpose, namely, that the rooms should be used for a brothel, the contract would then have been clearly void, and the plaintiff would not have been allowed to have recovered under it against the defendant. *Ritchie v. Smith*, 6 C. B. 462; *The Gas-light and Coke Company v. Turner*, 5 Bing. N. C. 666; affirmed in error, 6 Bing. N. C. 324. Is the defendant, then, because he was innocent as regards the illegal purposes for which the agreement was made, to be in a worse position than he would have been, had he been a guilty party to it?

[MAULE, J. That is a strong way of putting it; but, there is this difference between this case and *Ritchie v. Smith*, that here nothing was done in furtherance of the intention. As long as the intention remained only in the mind of the plaintiff, and was not communicated to the defendant, the contract was good.]

Yet where, as here, it was proved, and so found by the jury, that the plaintiff took the premises for an immoral purpose, it is submitted that the court will not assist him in obtaining possession of the premises from the owner, under a contract which he had entrapped such owner into making. *Holman v. Johnson*, Cowp. 343; *Fivaz v. Nicholls*, 2 C. B. 501; Chit. Contr. 547. The contract was either void as soon as it was made, or it was obtained fraudulently, and for such an improper purpose, that the court ought not to aid a guilty party in recovering on it. [It was also contended that there was sufficient evidence of fraud to support the verdict.]

May 29. *Dawson and Giffard*, in support of the rule. First, the evidence was wrongly received as to the plaintiff's previous character. The plaintiff made no representation himself, and the referee *bond fide* believed what he said of him. Secondly, the mere intention of the plaintiff, at the time of making the agreement, (assuming that he had the intention,) to use the premises for illegal and other purposes than those which he represented, will not vitiate the contract. The mere knowledge by one party of the illegality of the intention of the other, will not prevent the recovery on the contract. Selw. N. P. 62, 11th ed. In *Bowry v. Bennett*, 1 Camp. 348, it was held that a man might recover against a prostitute the price of clothes sold to her, although he was aware of her way of life. In Co. Litt. 206, b., it is said, "by a feoffment on condition to kill J. S., the estate is absolute, but the condition void;" which would show that in the present case, if both parties had known of the illegality of the intention of the plaintiff, still the term would pass. But, thirdly, it is a fallacy, on the part of the defendant, to say that the court is asked to assist the plaintiff in enforcing an illegal contract. Assume that it was illegal, still, the plaintiff has become possessed under that contract of an estate in possession in the premises; and he has a right to be put in the same position, and he must be treated as if he were still in possession, and the defendant were bringing an ejectment. It would be impossible to say, that the defendant could recover in the face of the

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lease. The cases of *The Gas-light and Coke Company v. Turner*, and *Ritchie v. Smith*, have, therefore, no application at all.

[MAULE, J. The counsel for the defendant argued, from those cases, that inasmuch as one of two guilty parties could vacate an illegal contract, *à fortiori*, the one of them that was innocent could.]

That might be if the present case lay in contract; but here the contract, namely, the lease, has had its full operation. And, assuming that there was misrepresentation, on the part of the plaintiff, as to his own character and intention, and that he did intend, when he made the contract, to use the premises for the purpose he afterwards did use them, still, this misrepresentation was as to a matter collateral to the lease, and cannot divest the interest in the term which has become vested in the plaintiff.

[CRESSWELL, J. Suppose the premises let expressly for an illegal purpose, with a covenant by the lessor to give possession on a certain day, can the lessee sue the lessor for not giving possession?]

No; there the matter would be only in contract.

[MAULE, J. You say, although the lessee could not enforce the contract, yet if he had been permitted to enter, the lessor, though he had his election to repudiate the contract, not having exercised that election, cannot afterwards oust the lessee. The estate vested by entry, and cannot be divested.]

Precisely so; the defendant here granted the term, and fully intended to do so. All that was requisite to make a valid demise concurred; there was the disposing mind and intention of the lessor, followed by the entree of the lessee; *Mason v. Ditchbourne*, 1 Moo. & R. 400, and *Emanuel v. Dane*, 3 Camp. 299, are in point for the plaintiff. In the former case it was held, in effect, by Lord Abinger, that a fraudulent misrepresentation by the plaintiff as to the amount of a business would not vitiate the deed, by which the defendant had bound himself to pay so much for it; and the learned chief baron said: "In a court of law, it has always been my opinion that such a defence is unavailing when once it is shown that the party knew perfectly well the nature of the deed he was executing." So, here the defendant knew perfectly well what he was doing, and the effect of it. It is not contended for a moment that he did not intend to demise the term. In the other case, it was held by Lord Ellenborough, that trover would not lie for a watch which had been exchanged by the plaintiff with the defendant for a pair of candlesticks, which the latter represented to be silver, but which turned out to be base metal. In the case of *Hart v. Windsor*, 12 M. & W. 68, which was the converse of the present case, the lessee seeking to vacate the lease by reason of the premises being unfit for the purpose for which they were demised, it was held that this was no answer to an action for the rent; and Parke, B., delivering the judgment of the court, at the close of it, says: "It is much better to leave the parties to protect their interests themselves, by proper stipulations; and if they really mean a lease to be void by reason of any unfitness in the subject for the purpose intended, they should express their meaning" So here the defendant might, had he chosen,

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have stipulated in the lease that it should be void if the plaintiff did not use the premises as a perfumer, or if he used them for any improper purpose. [They also cited *Edwards v. Brown*, 1 Cr. & J. 307, and *Lewis v. Jones*, 4 B. & Cr. 506.]

JERVIS, C. J. I have still considerable doubt on the point made as the ground for a new trial. During a considerable part of the argument of the case, I certainly inclined to the opinion that the rule ought to be discharged as far as the point reserved went; but Mr. Giffard has convinced me that I was wrong, and I am now clearly of opinion that the rule to enter the verdict for the plaintiff must be made absolute. Several points were made which it now becomes unnecessary to decide. First, it was said that a quantity of evidence had been received regarding the plaintiff's character, namely, as to charges which had been made against him previously to the transaction in question, which evidence was inadmissible; and I am inclined to think that it was so. Secondly, it was said that there was no evidence of a fraudulent misrepresentation. On that, I think there was evidence from which the jury might infer fraud; but it is unnecessary to decide either of these points, because I think, as Mr. Giffard well put it, assuming the evidence touching character to have been properly received, and also that there was a fraudulent misrepresentation by the plaintiff that he intended to carry on the business of a perfumer, when, at the time he made that representation, he intended to use the apartments as a brothel, that still the plaintiff is entitled to have the verdict entered for him. Mr. Raymond contended, that inasmuch as an agreement to let apartments for an immoral purpose is illegal and void, and as the plaintiff has been turned out of possession, the court will not reinstate him, as that would be enforcing an illegal agreement. This was certainly my view of the case for some time; but Mr. Giffard has pointed out the distinction, and convinced me that that view is erroneous. The question is, when the agreement has been made, and the plaintiff put in actual possession, not by the agreement only, of the premises intended to be leased, whether the term vested. Mr. Giffard correctly said that every thing necessary in order to create the term was done by the parties to the agreement. The defendant intended to grant the term, and executed the agreement, and delivered possession to the plaintiff of the term created, if any were created under it. The interest, therefore, in the lease passed into the plaintiff. How is that interest divested? Not by any misrepresentation made to the defendant, or operating in his mind, with reference to the legal effect of the instrument which he executed, but, as the defendant contends, by the plaintiff having falsely represented to the defendant, and induced him to believe, that he, the plaintiff, was about to do something which was merely collateral to the contract, namely, to use the apartments for the business of a perfumer, whereas he intended to turn them to the purposes of a brothel. Now, I think, assuming this misrepresentation to have taken place, and the intention of the plaintiff to have been what the defendant contends it was

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at the time, still, that misrepresentation was collateral to the agreement, and does not avoid it; and the interest having passed under it, the plaintiff is entitled to regain possession of that interest once vested in him by possession; nor can the intention of the plaintiff, or what was passing in his mind at the time, avoid or affect in any way the lease granted by the defendant. In the cases cited by Mr. Raymond, it was sought of the court to enforce the doing of something in pursuance of an illegal contract, and the illegality did not rest in intention merely. In *Ritchie v. Smith*, the plaintiff sought to enforce a covenant for the payment of rent in a deed entered into by both parties, for the express purpose of evading the law. So, in *The Gas-light and Coke Company v. Turner*, it was sought to enforce the performance of a lease executed by both parties with a view to, and for the express purpose of, doing that which was prohibited by the law. In each of the cases there was something more than mere intention, and the agreement itself was executed to carry out the illegal object contemplated by the parties. In the present case the agreement itself was perfectly legal; the misrepresentation was on a matter collateral to the agreement; the defendant intended to demise, and did demise, and the plaintiff entered under it; and his title is therefore valid.

MAULE, J. I am of the same opinion. The plaintiff is not calling on the court to enforce any agreement at all. The agreement was an agreement to demise, and that was followed by entry on the demised premises. The agreement, therefore, was completely executed and had its full operation, and made the premises the property of the plaintiff for the term granted. No recourse was necessary to any court of justice to enforce the agreement. The present is an action of ejectment, to afford a remedy to a person against another who has excluded him from the possession of certain premises, and to replace the person ejected in possession. The present is very different from cases of persons suing on an express agreement to do an illegal act. In *Ritchie v. Smith*, the plaintiff and defendant had entered into an agreement to evade the law; and in the action, the court was asked to enforce this illegal agreement, namely, to compel the defendant to pay rent due under the agreement, to which the defendant pleaded the illegality, saying the agreement was illegal, and therefore the court ought not to enforce it; and if the court had not listened to this defence they would have been enforcing the doing of an act which the defendant was only bound to do by an illegal contract; they would, in fact, have been enforcing an illegal contract. Here the case is very different. It is quite clear that the defendant intended to vest the term in the plaintiff, which the defendant does not deny, but says: "Inasmuch as you made a false representation as to the purpose for which you wanted the premises, nothing passed by the demise and entry." There is no authority for so broad a proposition, and it would lead to extremely inconvenient consequences were we to hold that a title once vested might at any time be impeached on the ground that the party conveying had been induced to convey by a fraudulent mis-

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representation as to the purpose to which the premises were to be applied. In a court of law no such defence can be set up. The defendant, if he was imposed on, has his remedy in equity; but in a court of law he cannot say that the term did not pass. As to the plaintiff's intention at the time when the agreement was made, that cannot make the agreement void, for *non constat* that he might not have changed it the next minute.

CRESSWELL, J. I am also of opinion that this rule should be made absolute. The actual use of the premises for an immoral purpose, would not avoid the lease, nor could the present intention of the plaintiff so to use them, at the time when the lease was made, avoid it. The only question is, whether the fraudulent deception as to the purpose for which the plaintiff intended to use the premises, would prevent the term vesting. Mr. Giffard's argument, and the cases he has cited, have convinced me that it would not.

CROWDER, J. I am of the same opinion. At the trial, this appeared to me to be an undefended ejectment. A lease duly executed was produced, and the plaintiff shown to have been put in possession under it. The defence relied on was, that some deception had been practised on the landlord, and the criminal intention of the tenant. At the suggestion of the counsel for the defendant, I left two questions to the jury: first, whether the defendant was induced to make the agreement by the fraud and misrepresentation of the plaintiff, as to his character, and as to the use he intended to make of the premises; and, secondly, whether the plaintiff intended, at the time the agreement was made, to use the premises for an immoral purpose. The jury found both questions in the affirmative. I thought, at the time, that the facts disclosed no defence to the action. It seems quite clear, that the term had passed to the plaintiff, and the interest granted by the defendant vested in the plaintiff; for the misrepresentation as to matter collateral could not prevent the demise from taking effect; for the defendant intended to demise, and had no illegal intention. But then it was said, that the fact of the defendant having turned the plaintiff out, would make a difference, and that the defendant was endeavoring to enforce a right which he had obtained by fraud, and for an illegal purpose. But that is not so. The only question in the cause was the recovery by the plaintiff of the premises of which he had been once legally possessed; for, as I have already said, the fraudulent representation did not prevent the demise from taking effect; and the court must look at the case just in the same way as if the defendant were attempting to turn the plaintiff out by an action of ejectment; and there is no case to show, that, under the facts found by the jury, he could have so recovered. All the cases cited for the defendant, were cases in which the parties had entered into illegal contracts, which it was endeavored to enforce by action on those contracts. Then the illegal intention of one of the parties, clearly would not render the agreement void; for it might have rested in mere intention, and never been carried out

Rule absolute.

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THE ECCLESIASTICAL COMMISSIONERS v. THE LONDON AND SOUTHWESTERN RAILWAY COMPANY.

June 13, 1854.

Copyholds — Lands Clauses Consolidation Act — Enfranchisement — Compensation to the Lord.

The 95th section of the 8 & 9 Vict. c. 18, (the Lands Clauses Consolidation Act,) declares that every conveyance of copyhold lands to the promoters of the undertaking, is to be entered on the rolls of the manor, and when enrolled to have the like effect, as if the same had been of freehold tenure; but nevertheless, until enfranchised, it is to continue subject to the same fines and services as theretofore payable. The 96th section enacts, that within a certain time the promoters are to procure the lands taken by them to be enfranchised, and for that purpose are to apply to the lord of the manor, and to pay him such compensation as may be agreed upon; and, in estimating such compensation, the loss in respect of the fines and other services payable on alienation, or any other matters, which would be lost by the vesting of such copyhold lands in the promoters, or by the enfranchisement of the same, is to be allowed for: —

Held, that upon an enfranchisement of copyhold lands taken by a corporation, the lord is not entitled to any fine as upon admittance upon the execution or enrolment of the conveyance, pursuant to the 95th section, or in estimating the compensation for enfranchisement under the 96th section.

THE following case was stated for the opinion of this court.

The plaintiffs are lords of the manor of Sutton Court, in the county of Middlesex, formerly annexed to and forming part of the separate estate of the deanery of the cathedral church of St. Paul, London; and the defendants, under the provisions of the Windsor, Staines, and Southwestern Railway Act, (No. 1,) 1847, prior to the 13th July, 1852, became the purchasers of the undertaking by the said act authorized, and the same was thereupon and is now legally vested in the said company, accordingly. On the 13th July, 1852, a deed was duly executed by the parties, of which the following is a copy: "This indenture, made the 13th day of July, 1852, between John Luke Wetten, of No. 48 Conduit-street, Hanover-square, in the county of Middlesex, gentleman, of the one part, and the London and Southwestern Railway Company, incorporated by act of parliament, of the other part. Whereas, under and by virtue of the last will and testament of Luke Wetten, late of London Style House, in the parish of Chiswick, in the said county of Middlesex, Esquire, deceased, dated the 17th day of September, 1806, the said John Luke Wetten is seised or possessed for an estate for his life, of and in the copyhold messuages or dwelling-houses, lands, and premises lately belonging to the said Luke Wetten, deceased, situate and being in the parishes of Chiswick and Ealing, in the said county of Middlesex, comprising therein the pieces of land hereinafter described, and intended to be hereby conveyed, being copyhold of the manors of Sutton Court and Ealing, in the said county of Middlesex; and whereas, by virtue of the Windsor, Staines, and Southwestern Railway Act, (No. 1,) 1847, in which was incorporated the Lands Clauses Consolidation

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Act, 1845, the Windsor, Staines, and Southwestern (Richmond to Windsor) Railway Company were authorized to make and maintain the Windsor, Staines, and Southwestern (Richmond to Windsor) Railway, as therein mentioned; and whereas the pieces of land and hereditaments hereinafter described, and intended to be hereby conveyed, having been required by the said Windsor, Staines, and Southwestern (Richmond to Windsor) Railway Company for the purposes of their said railway, the last-mentioned railway company contracted with the said John Luke Wetten, who, as such tenant for life as aforesaid, was enabled by the said acts of parliament, or one of them, to sell the said pieces of land and hereditaments hereinafter described, for the absolute purchase thereof in fee-simple in possession, according to the custom of the manors of which the same pieces of land are respectively holden, free from incumbrances, at the sum of 250*l.*; and the said John Luke Wetten agreed to accept from the said last-mentioned railway company the further sum of 1,000*l.* as compensation for the severance of the entirety of the said copyhold premises by the said pieces of land so taken by the said railway company, and for residential injury, and for all other permanent damages or injury, and also for the rights given to the said company by the third section of the said contract; and whereas, in further compliance with the directions of the said Lands Clauses Consolidation Act, 1845, the said last-mentioned company, on the 14th November, 1849, paid the sum of 250*l.* (being such purchase or consideration money as aforesaid) and the sum of 1,000*l.*, (being such compensation money as aforesaid,) into the Bank of England, in the name and with the privity of the Accountant-General of the Court of Chancery, to his account there, ‘*Ex parte* the Windsor, Staines, and Southwestern (Richmond to Windsor) Railway Company, *in re* the Windsor, Staines, and Southwestern Railway Act, (No. 1,) 1847,’ as appears by the receipt in writing, dated the said 14th November, 1849, of the cashier of the said bank; and whereas, pursuant to the provisions for that purpose contained in the said Windsor, Staines, and Southwestern Railway Act, (No. 1,) 1847, the said Windsor, Staines, and Southwestern (Richmond to Windsor) Railway, and the benefit of all agreements and proceedings whatsoever entered into or taken by the said Windsor, Staines, and Southwestern (Richmond to Windsor) Railway Company for the purchase or acquisition of any lands, tenements, and hereditaments, and all rights, powers, and privileges by the said last-mentioned act conferred upon, or vested in, or otherwise belonging to the said last-named company, have been duly transferred to and are now legally vested in the said London and Southwestern Railway Company.” The indenture then stated that John Luke Wetten, as well in respect of his estate in the premises as in execution of the powers given by the Lands Clauses Consolidation Act, 1845, conveyed unto the London and Southwestern Railway Company and their successors certain copyhold land therein described, to hold unto the said railway company, their successors and assigns, forever, according to the true intent and meaning of the said acts of parliament; and contained a covenant by the said John Luke Wet-

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ten, that the land so intended to be conveyed stood limited or settled to the use of him, the said John Luke Wetten, and the heirs of his body. The said indenture was duly executed and delivered by the said John Luke Wetten on the said 13th July, 1852, at which date the said John Luke Wetten was the tenant, by copy duly admitted, of the said hereditaments, as for an estate for his life, according to the custom of the said manor.

The said indenture was entered on the rolls of the said manor of Sutton Court, on the application of the said London and Southwestern Railway Company, in or about the month of February, 1853. By the custom of the manor of Sutton Court, the lord is entitled to a fine, equal in amount to two years' improved value, upon every alienation by surrender and admittance. By the custom of the same manor, the lord is entitled to seise *quousque* into the hands of the lord, if the surrenderee make default in being admitted, when and so soon as proclamations shall have been made at three successive courts. In accordance with the provision contained in the 96th section of the Lands Clauses Consolidation Act, 1845, incorporated in the defendants' act, the London and Southwestern Railway Company applied to the plaintiffs to enfranchise the hereditaments so granted and conveyed to them as aforesaid, and the said plaintiffs were willing to enfranchise the said hereditaments upon being paid such amount as they should be entitled to under the provisions of the said last-mentioned statute in that behalf. The following are the sections of the Lands Clauses Consolidation Act, 1845, bearing upon the question at issue: Section 95. "Every conveyance to the promoters of the undertaking of any lands which shall be of copyhold or customary tenure, or of the nature thereof, shall be entered on the rolls of the manor of which the same shall be held a parcel; and on payment to the steward of such manor, of such fees as would be due to him on the surrender of the same lands to the use of a purchaser thereof, he shall make such enrolment; and every such conveyance, when so enrolled, shall have the like effect, in respect of such copyhold or customary lands, as if the same had been of freehold tenure; nevertheless, until such lands shall have been enfranchised by virtue of the powers hereinafter contained, they shall be continued subject to the same fines, heriots, and services as were theretofore payable and of right accustomed." Section 96. "Within three months after the enrolment of the conveyance of any such copyhold or customary lands, or within one month after the promoters of the undertaking shall enter upon and make use of the same for the purposes of the works, whichever shall first happen, or, if more than one parcel of such lands holden of the same manor, shall have been taken by them, then within one month after the last of such parcels shall have been so taken or entered upon by them, the promoters of the undertaking shall procure the whole of the lands holden of such manor so taken by them to be enfranchised, and for that purpose shall apply to the lord of the manor whereof such lands are holden, to enfranchise the same, and shall pay to him such compensation in respect thereof, as shall be agreed upon between them and him; and if the parties fail

to agree respecting the amount of the compensation to be paid for such enfranchisement, the same shall be determined as in other cases of disputed compensation; and in estimating such compensation, the loss in respect of the fines, heriots, and other services payable on death, descent, or alienation, or any other matters, which would be lost by the vesting of such copyhold or customary lands in the promoters of the undertaking, or by the enfranchisement of the same, shall be allowed for." Section 97. "Upon payment or tender of the compensation so agreed upon or determined on, on deposit, thereof in the bank in any of the cases hereinbefore in that behalf provided, the lord of the manor whereof such copyhold or customary lands shall be holden, shall enfranchise such lands, and the lands so enfranchised, shall forever thereafter be held in free and common socage; and in default of such enfranchisement by the lord of the manor, or if he fail to adduce a good title thereto, to the satisfaction of the promoters of the undertaking, it shall be lawful for them, if they think fit, to execute a deed-poll, duly stamped, in the manner hereinbefore provided in the case of the purchase of lands by them; and thereupon the lands in respect of the enfranchisement whereof such compensation shall have been deposited as aforesaid, shall be deemed to be enfranchised, and shall be forever thereafter held in free and common socage." It was agreed between the parties, that if the plaintiffs were entitled to claim a fine as upon admittance, upon the execution of the conveyance by the copyhold tenant, pursuant to the said 95th section, and the said enrolment of the said conveyance; or if, in estimating the amount of compensation to be paid for such enfranchisement, the plaintiffs were entitled by law to claim in respect of the fine to which they would have been entitled if the estate in question had become vested in the said company by surrender and admittance according to the custom of the manor, instead of the said statutable conveyance; then, in either of the said cases, the sum which the plaintiffs were entitled to receive for such compensation, was 311*l.*; but if, in estimating the said compensation, the plaintiffs were not entitled to make any claim in respect of the said fine, the plaintiffs were to receive the sum of 259*l.*, and no more. And it was thereby further agreed that each party should, in either event, pay their own costs. The questions on which the opinion of this court was desired, were: first, whether the plaintiffs were entitled to the payment of any fine, either upon execution of the said conveyance by the copyholder under the provisions of the said 95th section, or upon enrolment of the said conveyance; secondly, whether, in estimating the said compensation, the plaintiffs were entitled to claim from the defendants in respect of the said fine in manner before mentioned.

Hill, Q. C. for the plaintiffs. The plaintiffs are entitled to a fine as upon admittance. It was decided in *Cooper v. The Norfolk Railway Company*, 3 Exch. 546, that under this 95th section of the Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18, the steward was entitled to the fees only on surrender, and not on admittance; but that decision turned on the particular words of the section, which, in the

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case of the steward, limit the fees to those on surrender. This does not affect the rights of the lord. Although a corporation cannot, perhaps, become tenants by surrender and admittance, yet there may be an admission by implication; 1 Scriv. Copyh. 306 *et seq.* 4th ed.; and under this statute there must be a taking in order to there being afterwards an enfranchisement under the 96th section. The case turns on the construction of the 95th and 96th sections of the Lands Clauses Consolidation Act; and upon the true construction of these sections, by which it is expressly provided that until enfranchisement, the lands are to be subject to the same fines as were before payable, it is submitted, that either as upon an implied admission, or in considering the compensation, the plaintiffs were entitled to the fine in question. *Drury v. Man*, 1 Atk. 95; *Wilson v. Allen*, 1 J. & W. 611.

Bovill, for the defendants. The plaintiffs are not entitled to the fine. The legislature does not say that the conveyance is to be the same, in effect, as a surrender and admittance, but that it is to have the effect of a conveyance of freehold. The claim of the plaintiffs can only be by virtue of the act; but such a claim is contrary to the object of the act, which is to give the conveyance the effect of a freehold conveyance. The proviso in the 95th section, that the lands are to continue subject to fines, contemplates a person remaining tenant to the lord, but it cannot be applicable to a corporation, which is unable to render copyhold services. The question in dispute, really turns upon the 96th section, which states what the lord is to have on the enfranchisement. The plaintiffs say that they are to have, not only the compensation for the loss sustained by enfranchisement under this 96th section, but also compensation for a benefit accruing upon the conveyance. The statute, it is submitted, never meant to give the plaintiffs both, but only a compensation for the loss. [He was then stopped by the court.]

Hill, in reply. The statute provides for two things — one is, the placing the promoters in the situation of tenants; and the other is, the compensation on the enfranchisement. What could be lost “by reason of the vesting of such lands in the promoters,” if not the fine payable on such vesting? And, therefore, in one of the ways claimed, the plaintiffs are, it is submitted, entitled to such fine.

MAULE, J.¹ It appears to me that the plaintiffs are not entitled to the compensation sought to be recovered. The 95th and 96th sections of the Lands Clauses Consolidation Act, appear to be drawn with great accuracy, and they provide, that, in case of the sale of land of copyhold tenure, there is to be a conveyance between the copyholder

¹ JERVIS, C. J., being one of the Ecclesiastical Commissioners, had left the court during the argument of this case.

and the company, which conveyance, when enrolled, is to have the **like** effect, in respect of such copyhold lands, as if the same had been of freehold tenure; nevertheless, until such lands shall have been enfranchised by virtue of the powers afterwards contained in the act, **they** are to continue subject to the same fines, heriots, and services as **were** theretofore payable. Now, it is quite just that such a proviso as to fines and heriots, should exist for the benefit of the lord. The effect of this conveyance, which the act refers to, is entirely statutable; it conveys the lands as if they were freehold. The 95th section provides that the conveyance shall be entered on the rolls of the manor, and on payment to the steward of such fees as would be due to him on a surrender, he is to make the enrolment; and the enrolment coupled with the statute, gives notice to the lord that the company are entitled to apply to have the lands enfranchised under the act, and, in the mean time, the fruits of the tenure, (if any,) are preserved to the lord. The 96th section provides, that within a certain time, the promoters of the undertaking, are to procure the lands of the manor so taken by them to be enfranchised, and for that purpose they are to apply to the lord to enfranchise the same, and to pay him such compensation in respect thereof, as shall be agreed upon between them and him; that means a compensation in respect of such enfranchisement; and in estimating such compensation, the loss in respect of fines, heriots, and other services, or any other matters, which would be lost by the vesting of such copyhold lands, or by their enfranchisement, is to be allowed for. Now that, I apprehend, means, that if, by the vesting of the land (which is compulsory in the lord) as if it had been freehold, there should be a loss to the lord of fruits of the tenure, that is to be a loss by the vesting, and to be considered in the compensation. It seems to me, that the statute puts the lord and the company in this position, namely, that the lord is obliged to part with his manorial rights to the company, on payment by them of what is a reasonable price. The compensation to be paid is for what is so taken from him, which is the lord's copyhold rights, and no more than what is a compensation for this, ought, in point of justice, to be given to him. If you were to say that the lord is to have also a fine from the company as upon the alienation, you would put the company in a different situation from that in which a party would be who was dealing with the lord for enfranchisement, without the aid of the act of parliament. Suppose the party so dealing with the lord, were a corporation, what would have been the transaction? It could not have been a transaction of surrender and admittance, for such a voluntary enfranchisement could not possibly have taken place. I think, looking at the spirit of this act of parliament, it is clear that this fine was not intended to be given; and I also think that the same is equally clear from the words of the statute. It seems to me, that, in order to have given this fine to the lord, the statute should have said, that, upon enrolment, the lord should have the fine as on alienation, in addition to the compensation. For these reasons I think the plaintiffs are not entitled to any fine.

 Hayworth v. Barnes.

CRESSWELL, J., concurred.

CROWDER, J. I am of the same opinion. The statute does not say that the lord is to have any fine, but only a compensation for the loss sustained by him by the enfranchisement.

Judgment for defendants.

HAYWORTH v. BARNES.¹

April 22, 1854.

Contract — Offer by Letter — Acceptance — Further Stipulation.

In an action on a contract for the supply of goods during a term of three years, it appeared, upon the general issue, that the defendant, on the 20th November, 1852, had written to the plaintiffs a letter in which he agreed to supply them with coals "for three years from this date," at a certain price. The defendant had answered, by another letter, that he agreed to take from the plaintiffs the whole of the coals he required, commencing from the 1st October, 1852, at the same price. There was evidence that before the 1st October the supply had been at a different price, but from and after that date, and down to the time of breach, at the rate mentioned in the letter. Upon a rule to set aside a nonsuit:—

Held, 1. That as the fact of the plaintiff's answer having been sent in writing came out in the course of the plaintiffs' own evidence, it must be produced. 2. That as the letters varied in their terms, there was no contract in writing. 3. That the parol evidence, if it proved a contract, on the terms of the last letter, proved a contract for three years,—which was required to be in writing, under the statute of frauds. And that, therefore, the plaintiffs could not recover.

APPLICATION for a new trial, on the ground of misdirection in regard to evidence. The action was on a contract, by which the plaintiffs were to take coals, exclusively from the defendant, and the defendant was to supply coals to the plaintiffs for the period of three years, from 20th of November, 1852, at a particular rate per ton. Breach: That before the expiration of that period the defendant refused to continue the supply. Plea: *Non-assumpsit*. At the trial before Cresswell, J., at the Lent Liverpool Assizes, the plaintiffs put in a letter from the defendants to the plaintiffs, dated 20th of November, 1852, in these terms: "I agree to supply you with coals, at my staith, for three years from this date, at 4s. 6d. per ton, and to grant you convenient privilege for depositing the same on your premises," &c. On cross-examination, it was elicited that there had been an answer to this; on which the learned judge ruled, although the plaintiffs' counsel offered to prove that they had acted on other terms, that the plaintiffs were bound to produce it, which they did, and it was in these terms: "We agree to take the whole of our consumption of coals from you for three years next ensuing, commencing from 1st

¹ *Coram* JERVIS, C. J., CRESSWELL, J., and WILLIAMS, J.

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of October, 1852, at 4s. 6d. per ton." There was evidence that before the 1st of October, 1852, the plaintiffs had been supplied with coal by the defendant at 5s. 0d. per ton; and that afterwards, down to the time of the breach, the coals had been supplied by him at 4s. 6d. The learned judge held, that as the letters varied in terms there was no written contract; and that the parol evidence did not dispense with it; and directed a nonsuit.

Atherton now moved for a rule to set aside the nonsuit, and for a new trial, on the ground of misdirection. First, there was no variance between the letters; they were not inconsistent, for they might be read thus: "The coals to be supplied for three years, from November 20, and also from October 1, to November 20."

[JERVIS, C. J. That latter term is not assented to in the writing.

CRESSWELL, J. The letter of the plaintiffs is not a simple acceptance of the defendant's offer; it is an acceptance, provided a certain stipulation is agreed to. The defendant could have declared off the next day.]

Secondly, there was evidence that the terms of the plaintiffs' letter had been agreed to by him, the supply being shown to have been at 4s. 6d. per ton, from the 1st of October.

[JERVIS, C. J. But what evidence was there that the supply was to be for three years?]

The evidence that the supply had been continued down to the time of the breach.

[JERVIS, C. J. Even if it were so, then the contract was for three years; and the assent to these terms, as it would constitute defendant's part of the contract, would require to be in writing.]

PER CURIAM.

*Rule refused.*¹

GETHER v. CAPPER.²

May 30, 1854.

Charter-party — Freight — Evidence.

On a declaration upon a contract to pay the highest freight which the plaintiff should be able to prove had been paid on the same voyage, (not less than 90s. per ton,) averment that all things had been done to entitle plaintiff to freight according to the charter-party; and also a special averment that the plaintiff was able to prove, as the fact was, that the highest freight paid was 7l. per ton, of all which the defendant then had notice; breach,

¹ Vide *Hegarty v. Milne*, 14 C. B. 62; s. c. 25 Eng. Rep. 346, and *Mollett v. Wackerbarth*, 5 C. B. 181.

² Coram JERVIS, C. J., MAULE, J., CRESSWELL, J., and CROWDER, J.

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non-payment of the freight at 7*l.* per ton, there being a traverse of the special allegation, and another plea that the plaintiff did not prove the fact : —

Held, on demurrer to the latter plea, that it was bad ; and that on the former plea plaintiff would have to prove that the fact was as alleged, and that the defendant knew that it was so ; and that this was proof enough, or dispensed with any other proof of the fact in question.

Semble, per MAULE, J., the general averment only applied to the lower freight.

ACTION on a charter-party, by which the defendants, the freighters, were to pay the highest freight the plaintiff should be able to prove had been paid on the same voyage, but not less than 90*s.* per ton.¹ Averment, that all things had been done, on the part of the plaintiff, to entitle him to freight according to the charter-party, and that the plaintiff, on the return of the ship, was able to prove, as the fact was, that the highest freight paid on the said voyage was 7*l.* per ton, of all which the defendant then had notice. Breach, non-payment of the said freight of 7*l.* per ton. Pleas : 1. (as to the claim above 90*s.* per ton,) that the plaintiff was not able to prove, nor was it the fact, that the highest freight paid on the said voyage exceeded 90*s.* per ton ; issue thereon. 2. That the plaintiff did not prove that any higher rate of freight than 90*s.* per ton had been paid for ships on the same voyage. Demurrer and joinder.

Lush, in support of the demurrer. The plea admits the averments in the declaration, that the defendant had notice that the plaintiff was able to prove, and that the fact was, that the freight was 7*l.* per ton. There is no allegation in the declaration that he did prove on it, nor on any thing in the contract to require it ; the meaning of the contract being, that the highest freight should be paid that had been paid on any similar occurrence.

[JERVIS, C. J. The question is, whether some proof would not be required.]

The plea admits that a higher freight had been paid, and that the defendant knew it.

[CROWDER, J. And that he knew it at the time.]

The Court called on

Raymond, (with whom was *Bovill*,) for the defendants, in support of the plea. The plea is addressed to the plaintiff's claim of freight above 90*s.* a ton, and it is a traverse of the general allegation that all things had been done to entitle the plaintiff to the higher freight.

[MAULE, J. That allegation only applies to the freight at 90*s.* per ton, for that would be "freight according to the charter-party."]

Then the declaration is bad for not including an averment that the plaintiff proved that a higher rate of freight had been paid, or, at least, the plea is good as negating that fact.

¹ See the declaration and pleas set forth in a report of the same case, on a motion to allow the same pleas, 25 Eng. Rep. 417.

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[MAULE, J. The declaration, in fact, contains an allegation that the plaintiff did prove that, for it avers that he was able to prove it, and that the fact was so, and that the defendant knew it. That was sufficient proof. The charter does not make it necessary absolutely, and under all circumstances to prove it, as if the defendant knew it. This is a mercantile contract, and between merchant and merchant it would be considered idle to ask for proof of what both the parties knew.]

On that construction, on a traverse of the allegation of notice of the fact, the plaintiff would have to prove that the defendant knew it. That might be sufficient, except on this view, that the contract may mean that the defendant should have documentary evidence of the rate of freight which he might be able to show to any third party.

[MAULE, J. I do not think that is so.]

At all events, the plea is good as an informal traverse of the averment of the fact and notice of it.

[CROWDER, J. Your first plea traverses that.]

That is no objection upon demurrer to the second.

[MAULE, J. That is so; no doubt, it would only be an objection against allowing the second.]

The defendant is entitled to judgment on it. It is a traverse that the defendant knew the fact, as his knowledge amounted to proof of the fact.

[MAULE, J. In the plea is a traverse that the plaintiff did prove the fact, whereas, if the defendant knew that, it would not be necessary to prove it.]

If the knowledge was equivalent to proof, then the plea in denying the proof denies the knowledge; if knowledge dispenses with the proof, the declaration should have alleged a dispensation.

[MAULE, J. In effect it does allege it.]

Then it is traversed by this plea.

[CROWDER, J. The plea is consistent with the plea that the defendant did know the fact.]

PER CURIAM.

*Judgment for the plaintiff.*¹

¹ *Bovill* applied for leave to amend the plea, by making it traverse that the defendant had notice or knowledge of the fact.

Lush contended that an affidavit was necessary, and that there should be a distinct application, to which the court agreed.

Weeton v. Hodd.

for the future, it may be presumed as to the past, and the bill may be presumed to have had the acceptance upon it as far back as it had existed at all.

[CRESSWELL, J. You might as well presume it to have existed two years.]

The bill did not exist then.

[CRESSWELL, J. How can you tell? On your principle, it might be presumed that it did. It was drawn in blank.]

It is to be presumed that it was accepted soon after it was drawn.

[CRESSWELL, J. The time of the drawing was not specified by the evidence.]

The presumption that the acceptance was upon the bill, applies during the intermediate period between the indorsement by the defendant to Gillott, and the handing of it by Gillott to defendant; because the plaintiff proved that the acceptance was on the bill when he took it, and the defendant did not prove that it was not on it when he indorsed it.

[CRESSWELL, J. It is one question, whether the defendant ought to have proved the negative of the fact you presume, and another question, whether you are entitled to presume it, unless you contend as a principle of law, the presumption of the affirmative from his not proving the negative. Probability has nothing to do with the burden of proof. Whether it is to be adopted as a rule of law that the fact was so, because the defendant did not prove it not to have been so, is one thing; whether it is a probable legal presumption, is a very different and independent question.]

There may be a presumption only against the party who could disprove the fact which is to be presumed.

[CRESSWELL, J. Do you say that it was a legal presumption, as a rule of law, that because the defendant did not disprove the fact that the acceptance was on it when he indorsed it, it is to be presumed that it was so?]

No; it was evidence to go to the jury.

[JERVIS, C. J. But it was not left to the jury; so, that if you are right, I am wrong, and there must be a new trial, unless you prefer that this rule should be made absolute, and the verdict limited to the first count.]

That would be preferred by the plaintiff. But it is submitted that there is a legal presumption that the bill was not indorsed until it was completed, and it would not be completed until it was accepted.

[CRESSWELL, J. If the defendant indorsed the bill when the acceptance was on it, of course he could not dispute it; he would warrant it genuine. But, in all the cases decided on that principle,¹ the

¹ *Smith v. Marsack*, 6 C. B. 486. *Hallifax v. Lyle*, 3 Exch. 446. Supposing the declaration to have averred an indorsement from the defendant to Gillott, and by Gillott to plaintiff, and the plaintiff being proved to have been a *bonâ fide* holder, before the bill was due. *Semble, per Lord CAMPBELL*, C. J., that defendant would have been precluded, as against him, from requiring further proof of a prior indorsement than

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question could not have arisen, if, as you contend, the mere indorsement were to be taken as *prima facie* proof, that the acceptance was prior to the indorsement.

JARVIS, C. J. It follows, from your argument, that by proving the indorsement, you will prove the acceptance. In *Roberts v. Bethell*, 12 C. B. 778; s. c. 14 Eng. Rep. 218, this court held that it is to be assumed that a bill is accepted soon after it is indorsed; but, a bill may be indorsed before it is accepted.]

Suppose a bill drawn payable so many days after sight, and it be not proved when it was accepted, the date of the acceptance is the date of the drawing, and the days are reckoned from the date of the bill.¹

[CRESSWELL, J. It is an adoption by the acceptor of the date of the bill, in the absence of evidence to the contrary.]

In this case the defendant, the drawer, and indorser, and Gillott, who passed the bill to the plaintiff, were partners.

[CRESSWELL, J. That of itself raises rather an inference that the bill was not drawn and indorsed in the usual course of business; for, if it had been, it would have been drawn in the name of the firm, and not indorsed by one partner and transferred by another.]

In *Roberts v. Bethell* it was said, per Maule, J., that it is to be presumed the bill is accepted soon after the time it is drawn, because it is for the interest of the drawer to have a negotiable instrument in a perfect state as soon as possible.

[CRESSWELL, J. Why presume that the bill was accepted before it got into Gillott's hands—the bill not having been drawn in the common course of partnership business?]

There was evidence that it bore an acceptance when indorsed.

[JARVIS, C. J. In my opinion the evidence rather showed that the bill was indorsed before it had any acceptance; for the defendant declared that he had not drawn and indorsed bills in blank after a certain time, the bill being filled up and accepted after that period.]

When applied to, he admitted the drawing and indorsing, and he did not deny the presentment.

[JARVIS, C. J. The acceptor had disproved it.]

He proved that it was not presented to himself personally. But, the defendant's admission amounted to an admission of liability; and, therefore, to an admission of a valid presentment: *Curlewis v. Corfield*, 1 Q. B. 814. In a case, in this court, it was held, that an admission of liability by the drawer, or promise to pay, is evidence of notice of dishonor. *Campbell v. Webster*, 2 C. B. 258.

[JARVIS, C. J. But here, there is not such an admission of liability; there is only an admission of the handwriting of the drawing and indorsing, which was all that was put to the defendant.]

the proof of the handwriting, and that the issue on Gillott's indorsement to the plaintiff must have been found for the plaintiff, though proved that defendant did not indorse to Gillott. *Lloyd v. Howard*, 15 Q. B. 995; s. c. 1 Eng. Rep. 227.

¹ Chitty on Bills, p. 292.

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O' Malley, with him *Dowdeswell*, was not called upon to support the rule.

JERVIS, C. J. I am of opinion that the rule must be made absolute to reduce the verdict, by the amount of the bill, in the second count. It is found, by the jury, that the acceptance is a forgery; and, therefore, there would be no authority to present the bill at the banker's, unless the acceptance were upon it when it was indorsed by the defendant, who would then have warranted the acceptance as genuine, and adopted it so as to be made responsible by a presentment according to its tenor. But of that there is no evidence. On the contrary, if the jury had been asked their opinion, I have no doubt they would have found that the bill was drawn and indorsed in blank, at a time anterior to the taking of the bill by the plaintiff, and that it was filled up, and the forged acceptance placed upon it, in the intermediate period; and, of course, the defendant, the drawer, and indorser would not be liable on a presentment, at the place mentioned in the forged acceptance. It is true that the defendant, when shown the bill, admits the drawing and indorsing to be his. But, that admission must be taken in connection with the circumstances, and did not amount to an admission of liability. It is accompanied by a statement, that he had drawn and indorsed bills in blank, but had never drawn any bills in blank after a date anterior to the date of the bill, which was not filled up in his handwriting; and this tends to show that the acceptance was after the drawing and indorsing. And the application on that occasion was not for payment of the bill, but merely to ascertain if the drawing and indorsing were by the defendant, which was all that was admitted. That was no admission of presentment or notice of dishonor; and, even if it were, it is contradicted by the express evidence in the case, for the alleged acceptor proved that the bill had never been presented to him; and presentment at the banker's was not valid. *Primâ facie*, the defendant might, very naturally, admit the presentment, assuming the acceptance to be valid, whereas it is shown that it was forgery; and that, therefore, the presentment was invalid. That explains or destroys the effect of the defendant's admission; and, by express proof, that there never was a presentment which would render him liable.

CRESSWELL, J. I entirely concur. It has not been contended that any thing but a presentment to Leate would have been valid: but, there was no such presentment; and, therefore, there could be no recourse to the drawer, unless he made some conclusive admission, by which he was to be bound. The only admission, made by the defendant, related to his handwriting; and a man may admit his handwriting without being liable on the bill. It must be considered that he had no knowledge at the time as to the acceptance; and, assuming it to have been genuine, the presentment would have been valid: but, it is shown that the acceptance was not genuine; and the defendant's admission did not relate to the presentment at all, but solely to the drawing and indorsing. There was no evidence, there-

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fore, to sustain the issue on the presentment; and the plaintiff cannot retain his verdict on it, merely because the defendant did not deny something which the plaintiff ought to have proved.

WILLIAMS, J., concurred.

Rule absolute, to enter the verdict for the defendant on the first issue on the second count.¹

JONES v. O'BRIEN.²

May 29, 1854.

Bill of Exchange — Evidence of Notice of Dishonor.

In an action by indorsee against indorser or drawer, any declaration by him, amounting to an acknowledgment of liability or to a promise to pay, made to any party applying on behalf of the plaintiff, is good evidence of notice of dishonor. And although the defendant is called to disprove the notice, yet, if the question be left to the jury on his credibility, and they find for the plaintiff, the court will not disturb the verdict.

ACTION on a bill of exchange, (due 4th October,) by indorsee against drawer: Pleas, traversing, presentment, and notice. The case was tried before Crowder, J., at the Sittings in Middlesex, after Easter term. No question was raised as to the presentment; and as to the notice of dishonor the evidence was, that one Stephens, an attorney, who had got the bill discounted by the plaintiff, for the defendant, had been applied to by the plaintiff, (who did not know the address of the defendant,) to give notice to the defendant. Stephens, however, when called, could not state positively that he had given proper notice, nor were any of his clerks called; but, he produced a note from the defendant, saying, that he would "see it arranged," and, also, proved a conversation in which the defendant had promised to give a judgment³ for the amount, and said, he was sorry the bill had been dishonored, and, subsequently, promised to settle it. The defendant was called, and said that, to the best of his belief, he had no knowledge of the dishonor of the bill till a fortnight afterwards, and

¹ *O'Malley* applied to enter the verdict on the second issue, as to notice; but the court refused, the point not having been taken at the trial, except as to presentment. He applied for costs of the rule, and it was granted.

Quain resisted this, and objected that the rule was only to reduce the damages; *sed per curiam*. It comes to the same thing in substance, the rule having been to reduce the verdict by the amount of the bill in the second count.

² *Coram* JERVIS, C. J., MAULE, J., CRESSWELL, J., and CROWDER, J.

³ *Vide* *Lundie v. Robertson*, 7 East. 231; *Baldwin v. Richardson*, 1 B. & C. 245.

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that the first intimation he had of it was, Stephens telling him about it. The defendant was cross-examined as to his credibility. The learned judge told the jury, that it was not necessary that direct evidence should be given of notice of the dishonor on the 4th, but that they must arrive at the conclusion that it was given on that day,¹ and that this might be proved by a promise to pay the bill;² but that if they believed the defendant, they must find for him. The jury found a verdict for the plaintiff.

Lush had obtained a rule to set aside this verdict, and enter a verdict for the defendant, on the ground that the verdict was against the evidence.

Hawkins, for the plaintiff, was not called upon to show cause.

Pollock, with him *Lush*, for the defendant, in support of the rule. There was no evidence of the notice of dishonor, apart from the evidence of the defendant, and he denied it.

[JERVIS, C. J. The jury clearly did not believe him.]

Assuming that they did not, there was no legal evidence.

[MAULE, J. There was what amounted to a promise to pay, which is evidence of notice.]

PER CURIAM. Clearly, there was evidence to go to the jury.

Rule discharged.

¹ *Quære*. The evidence might have been taken to show an acceptance of an insufficient notice, which may be proved under an allegation of notice. *Firth v. Thrush*, 8 B. & C. 387. The point might have been taken that Stephens was agent for the defendant to receive notice of dishonor. *Vide Ibid*.

² *Vide Croxon v. Worthen*, 5 M. & W. 5; *Chapman v. Annett*, 1 C. & K. 552, appears to be *contra*, but in reality it turned on the evidence; whether it amounted to a promise, by the defendant, to pay. The case above is reported because no other case of the kind has been reported, in which the defendant was called to disprove the notice, and because the case last cited has been considered to contravene the older decisions on the question. *Vide* the reporter's note to that case. But, in a recent case, that case was cited, and does not seem to have been construed by the court as at all inconsistent with the doctrine established by those decisions. *Et vide Caunt v. Thompson*, 7 C. B. 400.

Smith v. Eldridge.

SMITH v. ELDRIDGE.

June 8, 1854.

Evidence — Implied Agreement — Use and Occupation — Landlord and Tenant.

Although an action for use and occupation requires some agreement, express or implied, to pay for the occupation; yet, there may be a liability for use and occupation, where no action for rent could be maintained; therefore, if a party enter under an agreement for a demise at a certain rent—the rent not to commence until repairs are completed by the landlord, the agreement being silent as to the terms of present occupation—the entry and occupation before the repairs are executed may be evidence to go to the jury of an implied agreement to pay in the meanwhile what the premises were worth: and even if the tenant leave before the repairs are executed, the question will be, whether there was such an implied agreement; and if there were, he will be liable for a reasonable compensation for his occupation.

APPLICATION for a nonsuit on the ground of insufficiency of evidence. The action was for use and occupation: Plea. Never indebted. The cause was tried before Williams, J., at the London Sittings, when it appeared that there had been an agreement between the parties, to the effect that the plaintiff should grant to the defendant a lease of the premises in question, for seven years, from 24th June, the rent to be 55*l.* per annum, but not to commence until the house should be completed; the lessor to do all the drainage, and execute certain repairs. The defendant had let into possession a party, who had occupied, but, the repairs and drainage stipulated for not having been completed, he had left, for that reason, before the expiration of the first half year, and the defendant had in no other way occupied. The particulars claimed half a year's rent, at the rate of 55*l.* a year. On the part of the defendant, it was objected that the plaintiff should be nonsuited; and that there was no evidence to go to the jury. The learned judge declined to nonsuit the plaintiff; and left to the jury whether the defendant did not, by himself or under-tenant, take possession under an implied agreement to pay a reasonable sum for the occupation of the premises. The jury found for the plaintiff, for the value of the premises for half a year.

Kerr, for the defendant, now moved to enter a nonsuit, pursuant to leave reserved. The defendant entered under an agreement, by which no rent was to be paid until the repairs were completed.

[MAULE, J. Rent is different from a claim for compensation for use and occupation; and the learned judge rightly considered that, even supposing that as the house was not completed within the terms of the agreement, rent could not commence. Still, there might have been an implied agreement to pay what the occupation was worth; and that was left to the jury.]

¹ Coram JERVIS, C. J., MAULE, J., CRESSWELL, J., and CROWDER, J.

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The question turned upon the construction of the agreement, and that was a question of law.

[MAULE, J. No; it was a question of fact whether there was another agreement independently of the special agreement, and the learned judge left to the jury, whether there was such a distinct promise to pay for the possession, apart from the special agreement. That was the exact question which he ought to have left to the jury.]

Supposing there were evidence to go to the jury.

[JERVIS, C. J. There clearly was evidence. The agreement is silent as to the present occupation, and, therefore, the tenant, under it, would not occupy until the premises were in perfect repair: but, by a collateral contract, he said, according to the finding of the jury, "I will not pay a rent of 55*l.* a year until the repairs are completed; but I will at once occupy, and pay what they are worth in the mean time."]

PER CURIAM.

*Rule refused.*¹

TALBOT v. LAROCHE.²

May 22, 1854.

Patent — Particulars of Infringement — Pleading.

In an action for infringement of a patent, it is sufficient for the plaintiff to furnish such particulars of the infringement as show distinctly what are the acts of infringement he complains of, —that is to say, the article, the making or selling of which he alleges is an infringement upon his patent, and the places at which, and the period during which, he proposes to prove such making or selling; and it is not necessary to specify in what respects, or as to what parts or processes of the invention it is an infringement.

If, indeed, the processes are so entirely separate and distinct, as that different kinds of articles or results are produced, as if one produce pictures in oil and another in water colours, it seems that the particulars should specify the one, an infringement upon which is complained of; but if they are merely different modes of producing the same kind of article or result, it is not necessary so to distinguish; and it is not necessary to specify particular persons to whom, or the times at which, the article alleged to be a piracy has been sold; it is enough to state some period within which the sales took place.

ACTION for infringement of a patent for improvements, and for obtaining pictures or representations of objects. The particulars of infringements originally delivered, were in this form: "That the defendant, on the 1st of August, 1853, and on divers days between

¹ The distinction between rent and compensation for use and occupation, is amply illustrated in the old cases before the statute gave the right of action for use and occupation in cases where there has been a demise. See *Johnson v. May*, 3 Lev. 150; *Freemason v. Booman*, 2 Keble, 291; *Mason v. Welbank*, Skin. 238. *Et vide* the principle on which the above case was decided. *Jones v. Clark*, 2 Bulst. 78. *Et vide*, also, as to the distinction between an action for rent, and an action for use and occupation *Towne v. D'Eynrich*, 1 Com. Law Rep. 335; s. c. 24 Eng. Rep. 235.

² *Coram* JERVIS, C. J., MAULE, J., CRESSWELL, J., and CROWDER, J.

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that day and the commencement of the suit, at 65 Oxford-street, in the county of Middlesex, did infringe the patent of the plaintiff, by making, using, and selling pictures or portraits, made and executed according to plaintiff's invention, described in the patent, (otherwise than in relation to the parts disclaimed,) and by making, using, and selling plates, by which the invention was counterfeited, imitated, and resembled." A summons for further and better particulars was taken out, and heard before Crowder, J., who was of opinion that the particulars ought to be amended; and they were accordingly amended by adding those words: "The plaintiff further says, that one of such pictures or portraits was sold by the defendant at the place aforesaid to a certain person, (named,) on the 27th of April last; but he states this by way of instance and example only, and not so as to preclude him from proving any of the above-mentioned infringements;" and as for any further particulars, Crowder J. referred the defendants to the court.

Hannen now moved for a rule, calling on the plaintiff to show cause why he should not deliver further and better particulars of the infringements of the patent for which the action was brought. He moved upon an affidavit referring to the specification, by which it appeared that the plaintiff claimed in respect of several separate processes for taking pictures, and that he employed gallic acid in conjunction with a solution of silver to render paper sensitive to the action of light, and made visible photographic images upon the paper, strengthening them by washing them with a liquid operating on the paper which had been previously acted upon by the light, and so fixing the images retained. The plaintiff had originally claimed a daguerreotype process, which, however, he had since abandoned. The defendant used a process for pouring over the surface of glass, gun-cotton steeped in ether, which had previously been rendered insensible to light, and which process plaintiff did not claim. But the glass so covered being put into a camera, pictures were produced upon it, and this plaintiff alleged to be an equivalent to his process. The defendant stated that he did not understand in what way it was an infringement on the plaintiff's invention, nor upon which of the plaintiff's processes, and that he was embarrassed in his defence in consequence; and he stated distinctly that the plaintiff's processes mentioned in his specification were entirely different in character.

First, the particulars should specify what part or parts of his invention he alleges that the defendant has infringed. Even before the statute, the court, in the exercise of its ordinary jurisdiction, has called upon plaintiffs to give particulars of the infringements complained of, where the circumstances appeared to be necessary. In *Perry v. Mitchell*, Webster's Patent Cases, 269, where the specification claimed several ways of making pens, the declaration alleged the making of pens by the defendant, "in imitation of parts of the said invention, and additions to, and substitutions therefrom;" and upon affidavit showing that neither the parts of the invention nor the additions, nor the substitutions mentioned, were specified in the particulars, the

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plaintiff was ordered to give better particulars, specifying what were the parts of his invention which he complained had been infringed. Then the 15 & 16 Vict. c. 83, s. 41, provides, "That in any action for the infringement of letters-patent, the plaintiff shall deliver with declaration, particulars of the breach complained of, and that at the trial of the action, no evidence shall be allowed to be given of any alleged infringement not contained in the particulars delivered;" and section 43 provides that in taxing the costs of the action, regard shall be had to the particulars, unless certified by the judge to have been proved by the plaintiff, without regard to general costs. From this enactment it must be assumed that the plaintiff is to give some information which the declaration does not contain, and that the object is to economize the evidence; but under the present particulars it would be necessary for the defendant to provide evidence to meet any case the plaintiff may set up under his declaration; that is, under any of his processes. Suppose the plaintiff in the present case had not abandoned the daguerreotype process, it would have been necessary for the defendant to provide evidence that his process was not an infringement; or that it formed a part of plaintiff's invention. That could not have been intended by the legislature, and the effect would be that the section, as to taxation, of costs could have no operation, for it would be impossible, under particulars so general as the present, to say whether the plaintiff had failed in pursuing any part or not.

[CROWDER, J. Is not the meaning of the statute that the particulars must show the acts of infringement? That is, the times and the places of the sale of the article alleged to have been an infringement on the patent?]

It is submitted that the particulars ought to show the nature of the infringement.

[MAULE, J. Suppose the plaintiffs were to say that the defendant made portraits by a certain process — for instance, the collodion, and that it was an infringement of the patent, would it be sufficient?]

He ought to state on which of his processes it is an infringement.

[MAULE, J. Perhaps the plaintiff would not agree with you as to the process infringed upon by your manufacture. But is it not enough for him to say that, whether it is an infringement of one or another process or mode of producing the portrait, it is in substance the same article, founded upon the principle of his processes?]

That is not sufficient.

[JERVIS, C. J. Suppose a man were to patent an old invention with an improvement in two processes, and an improvement were to be found in one of the processes which would unite the two; would it not be enough to say that the defendant, by an equivalent producing the same result, and on the same principle, infringed on the plaintiff's patent?]

Probably so.

[MAULE, J. Doubtless the plaintiff, dealing with paper by certain processes produces photographic pictures, and the defendant, without following the same course precisely, produces, by the same principle,

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the same result; both he and the plaintiff knowing well what is the article the defendant sells, but the plaintiff not knowing upon which of his processes it is an infringement.]

The plaintiff's processes are not separate, and the defendant desires him to specify upon which of them he complains that the defendant made an infringement.

[MAULE, J. I do not think you are entitled to ask him to do so. You are entitled to particulars of breaches; that is, to be told, and particularly, what you have done to infringe the patent; but you are not entitled to say, 'Tell me not only what I have done which is an infringement, but the principle on which it is an infringement.']

The defendant does not ask that, but to be told on which of the plaintiff's processes he has infringed, and that the plaintiff can do in the words of his own specification.

[MAULE, J. The plaintiff has only several processes in this sense, that there are different modes of doing the same thing. Suppose a man goes to have his portrait taken, does the plaintiff say, 'Which of my processes will you prefer?']

It is believed that is so.

[MAULE, J. If a man takes out a process for making portraits in oil, and another for water colors, he ought to say which of them he alleges has been infringed.]

That is all that the defendant desires.

[JERVIS, C. J. That is not the question here. The point is not as to the process, but the material.]

The defendant does not so understand it. All he desires is to be relieved from the necessity of disproving an infringement on all the plaintiff's processes.

[MAULE, J. If the plaintiff had sued the defendant for using a certain process, and called it the collodion process, and said, that is the infringement, it would be sufficient; but if the processes of the plaintiff are distinct, it might not be so.]

The plaintiff's processes for portraits are in several distinct ways.

[JERVIS, C. J. If the plaintiff's processes were distinct, you would be entitled to particulars specifying one of them; but the plaintiff says that the glass which is covered with cotton steeped in ether is a substitute for paper prepared by gallic acid; and having that material he can produce pictures in several modes; but the defendant may do the same thing with his collodion process, the principle being one applicable to all processes.']

He ought to specify which process is infringed.

[JERVIS, C. J. If he specified one process, A, the defendant would admit his process to be a chemical equivalent for that process, A, in conjunction with process B, but it would be objected that the plaintiff had not specified process B.]

He ought to specify A and B.

¹ *Vide* as to the use of chemical equivalents being an infringement, *Heath v. Unwin*, 12 C. B. 522; s. c. 14 Eng. Rep. 202.

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[MAULE, J. You have a right to ask for particulars of infringement, but supposing he describes most accurately what it is you do which is an infringement, is not that sufficient?]

No, unless he point out of what it is an infringement — the process A, or process B, or both.

[MAULE, J. I do not think so. Suppose he said, "You have patented a certain work with plates, cuts, or engravings, (describing it,) and that is an infringement of my patent," is he bound to show how it is an infringement?]

Certainly not.

[MAULE, J. Suppose he says, "You use the collodion process, and that is an infringement of my patent for making pictures," is not that sufficient?]

No; there are several processes included in this patent.

[MAULE, J. Suppose an action of ejectment for forfeiture, or an action of covenant for non-repair; would it not be sufficient for the plaintiff's particulars of breaches to say, that the defendant omitted to repair a wall, or to clear a ditch?]

But suppose a covenant to repair a number of houses, would he not be bound to specify which of them is out of repair?

[JERVIS, C. J. Clearly so, but that is not an analogy to the present case; in which, because the plaintiff complains of an infringement applicable to different processes, you ask him to specify which process it is.]

The affidavit shows that the defendant is embarrassed.

[MAULE, J. That is to say, he is puzzled to find out how it is the plaintiff makes out that his process is an infringement. The defendant is not in doubt of what act it is which is complained of as an infringement.]

In the case cited, the plaintiff had to specify what part of the invention was infringed. It is submitted that the refusal of this application will render the statute nugatory.

[JERVIS, C. J. On the contrary; to accede to it, would be to contravene the object of the statute, which was passed in favor of patents; and it would complicate the proceedings on a trial to such an extent that particulars would have to be framed with the correctness of the most accurate specification.]

Secondly, the particulars do not sufficiently specify the dates; they only specify one date, and are not confined to that.

[MAULE, J. They need not specify that. They were sufficient in the original form. It is enough to say that, within certain dates, the sale of the article which is an infringement of the patent took place.]

Upon a plea in an action for the infringement of a patent, denying the novelty of the invention, the court requires the defendant to give the names of the parties who had used the invention.

JERVIS, C. J. That is in the knowledge of the defendant, and not of the patentee. Here the infringements being confined to a certain interval, the plaintiff will not take you by surprise, by proving any sales within that period. The plaintiff may have to call the defendant.]

Watkins v. Packman.

That would apply in any action for a breach of covenant.

[CRESSWELL, J. And I have known particulars refused at chambers, upon the ground that the defendant knew perfectly well what the breaches were, as in the action for non-repair, that he knew what premises were out of repair; the matter being as much in his knowledge as in the plaintiff's. You could scarcely expect the surveyor's estimate of the repairs required.]

PER CURIAM.

*Rule refused.*¹

WATKINS v. PACKMAN.

January 24, 1854.

New Trial.

The court refused, on the fourth day of Hilary term, to hear a motion for a new trial in a case tried before the under-sheriff, on the 9th of December preceding, where the notes of the under-sheriff, which had only been bespoken on the first day of term, were not produced.

THIS was an action for use and occupation, tried before the under-sheriff of Middlesex, on the 9th of December last. A verdict having been found for the plaintiff,

Pierce now moved for a new trial, on the ground of misdirection.

¹ In an action for infringing a patent, the court has a general power to order a particular of the alleged infringements. But where the specification claimed a combination of numerous improvements in electric telegraphs, the court refused to compel the plaintiffs to give the defendants such particulars, conceiving that, from the nature of the patent, the plaintiffs would thereby be put to great difficulty and embarrassment, and that under the circumstances, the matter having been debated in chancery, on a motion for an injunction, the defendants must be taken to possess sufficient information on the subject. *Electric Telegraph Company v. Nott*, 4 C. B. 462. That was before the New Patent Law Amendment Acts; but the principle appears to be that which will always be acted upon. *Vide per* Cresswell, J. *supra*. Even on particulars as to notices of objection, stating that the alleged invention was known to and used by A., B., and others, the court refused to compel the plaintiff to strike out the latter words. *Bentley v. Keightly*, 7 M. & G. 562. 8 Sc. N. R. 372. *Et vide*, as to notice of objection, *Jones v. Berger*, 5 M. & G. 208; *Heath v. Unwin*, 10 M. & W. 684; *Neilson v. Harford*, 8 M. & W. 806; *Fisher v. Dewick*, 6 Sc. 587. See particulars of unsoundness refused. *Pylie v. Stephen*, 6 M. & W. 813. So particulars of trespasses refused. *Horlock v. Lediard*, 10 M. & W. 677, there being only an affidavit that the defendant was, from the vague form of the declaration, unable to ascertain the grievance on which plaintiff intended to rely. So particulars of items of payments credited refused. *Myatt v. Green*, 13 M. & W. 377. The same principle pervades all the cases on the subject. *Et vide*, as to sufficiency of particulars, *Archbutt v. Pennall*, 1 D. & L. 318; *Higgins v. Ede*, 15 M. & W. 76; *Rennie v. Beresford*, 15 M. & W. 18; *Prichard v. Nelson*, 4 D. & L. 693. 16 M. & W. 773.

In re Perrin.

He was not, however, furnished with the sheriff's notes, though he stated that they were bespoken four days ago.

JERVIS, C. J. The rule¹ is imperative. You cannot move without the notes: and it is by your own laches that you are without them, inasmuch as the trial took place on the 9th of December last, and your client does not seem to have made any effort to obtain the notes, until the first day of the present term.

The rest of the court concurring,

Rule refused.

In re ISABELLA GRIERSON PERRIN.

January 24, 1854.

Husband and Wife — Concurrence of Husband in a Conveyance.

The court dispensed with the concurrence of the husband, (who was living separate from his wife,) under the 3 & 4 Will. 4, c. 74, s. 91, in a conveyance of property in which the wife had a separate interest under the will of her deceased father, where the husband had refused to execute the deed.

MRS. ISABELLA GRIERSON PERRIN, being entitled, jointly with her sisters, Mary Grierson Gladhill, and Janet Grierson Gainon, to certain property at Manchester, to her sole and separate use, under the will of her late father, James Gainon, and having agreed to sell the same,

Byles, Sergt., moved for an order under the 3 & 4 Will. 4, c. 74, s. 91, to dispense with the concurrence of her husband in the conveyance thereof, upon an affidavit disclosing the nature of her title, and stating that she was married to John Perrin on the 4th of May, 1845, that the parties lived together until August, 1852, when they separated for reasons alleged, and had ever since continued to live separate and apart from each other by mutual consent; and that application had been made to the husband to join in conveying the wife's interest to the intended purchaser, but that he refused so to do. The learned sergeant referred to *Mirfin, in re*, 4 M. & G. 685, (nom.

¹ See the resolution of the judges, 4 M. & Scott, 484, that, "upon all motions respecting causes tried before sheriffs, or judges of inferior courts of record, pursuant to the statute 3 & 4 Will. 4, c. 42, ss. 17, 18, the party making the application to the court above, must produce an examined copy of the notes of the sheriff or his deputy, or of the judge who tried the cause, together with an affidavit verifying such to be a true copy; and, also, in cases where no counsel had been retained to conduct the cause or defence in the court below, an affidavit setting forth the cause or nature of the application."

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Ex parte Murphy,) 5 Scott, N. R. 166, and *Woodcock, in re, antè*, Vol. I. p. 437, where the court had granted similar orders.

[WILLIAMS, J. Does the affidavit negative the husband's having any interest?]

Not in terms, though it does in effect.

JERVIS, C. J. We think you have brought yourself within the terms of the section.

PASHLEY and another v. THE MAYOR, &c. OF BIRMINGHAM.

January 31, 1854.

Practice — Changing Venue.

The venue may be changed in an action upon a specialty, before issue joined, upon an affidavit disclosing special circumstances.

THIS was an action brought by the plaintiffs to recover the sum of 4,461*l.* 19*s.* 8*d.*, alleged to be due to them from the defendants as the balance payable to them for building the jail of the borough of Birmingham. The declaration, which was delivered on the 2d of July, 1853, contained two counts — the first being on a contract by deed alleged to have been entered into between the plaintiffs and the defendants, for the building, by the former, of the Birmingham jail, — the second, for work and materials.

The defendants, on the 19th of October last, pleaded as follows: To the first count, — first, *non est factum*, — secondly, a traverse that the moneys which the plaintiffs were entitled to recover exceeded the amount paid, and that the said sum of 4,461*l.* 19*s.* 8*d.*, or any part thereof, was due, — thirdly, that, by the conditions of the contract, the work was to be completed according to certain drawings and specifications on or before the 29th of September, 1848, and that it was not so completed, — fourthly, that, by the said conditions, it was provided, that no payment should be made except on production of a certificate from the architect that a certain amount of work had been done and materials delivered; that the certificate should be delivered to the plaintiffs, and the amount thereof paid, at certain specified periods, in certain specified proportions; and that the remainder of such certificates should not be paid until three months after the architect should have certified the completion of the work to his satisfaction, when one half of the remainder should be paid, and the balance at the end of twelve months; and that the defendants had paid to the plaintiffs all amounts certified by the architect to be due to them; but that no certificate from the architect, entitling them to have the moneys claimed in the first count, had ever been produced to the defendants, or made by the architect; fifthly, that

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the works were not completed according to the drawings and specifications, or any alterations made under the agreement; sixthly, that, by the conditions, it was provided, that, in case of dispute or difference of opinion between the plaintiffs and the defendants relating to the said contract and conditions, or the said buildings and works, such dispute or difference should be settled by the said architect, whose decision should be final; that a dispute did arise between the plaintiffs and the defendants as to the sum which was due and payable to the plaintiffs under the contract and conditions; and that the architect decided that 3,983*l.* 3*s.* 6*d.*, and no more, was due and payable to the plaintiffs, which sum the defendants before action brought had paid to the plaintiffs; seventhly, (to the residue of the declaration,) never indebted; eighthly, (to the whole declaration,) payment; ninthly, (to the whole declaration,) a set-off.

Field, on a former day in this term—issue not having been joined—on the part of the defendants, obtained a rule calling upon the plaintiffs to show cause why the venue, which was laid in London, should not be changed to the Warwick division of the county of Warwick. The affidavit upon which the motion was founded, stated, that the plaintiffs lived and carried on business in the county of Warwick, and, as the deponent had been informed, and believed, all or by far the greater number of the witnesses whom they would probably call in support of their case, lived in or near Birmingham; that the deponent was advised, and verily believed, that the defendants had a good defence to the action upon the merits, and that it would be necessary to call, on the trial thereof, to establish such defence, at least thirteen witnesses, all of whom, respectively, lived in or near Birmingham, and none of whom lived in or near London; that, if the cause were tried in London, the costs thereof would, for the reasons aforesaid, be very far greater than if the trial took place in the county of Warwick; and that such last-mentioned county was in every other respect also the most convenient and fitting county for such trial to be had in.

Byles, Sergt., now showed cause, upon an affidavit of one of the plaintiffs, stating, amongst other things, that a great portion of the evidence to support the plaintiff's case was documentary, and that the witnesses, on their part, were few in number, not exceeding three or four; that the erection of the jail, and the works connected therewith, were conducted, on the part of the plaintiffs, by the deponent and the other plaintiff, and by a foreman employed by them, and the same were under the supervision of an architect, and a clerk of the works, on the part of the defendants, and which said witnesses could, as the deponent believed, give evidence as to the whole or nearly the whole of the work for which the action was brought; that the deponent was advised, and believed, that the issues in fact raised by the defendant's several pleas were very simple in evidence, and were within the knowledge of the before-mentioned parties as witnesses, and that the principal points raised by the pleas were

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issues in law; that the cause, from its nature, would, in all probability be referred; that the set-off claimed by the defendants under the ninth plea, was, as stated in their particular of set-off, a sum of 2,000*l.* for alleged liquidated damages for the alleged non-completion of the works within the time prescribed by the contract; that the course pursued by the defendants in the town-council of the borough had excited a prejudice against the claim of the plaintiffs in the council, and in the borough, and in its neighborhood; that the jury for the Warwick division of the county of Warwick are taken from the said borough (of Birmingham) and its neighborhood, as well as from other places, and that, if the cause were tried at Warwick, the jury would, in all probability, be composed of parties either in or connected with the corporation, and who, therefore, were parties directly interested on behalf of the defendants, and against the claim of the plaintiffs, and, therefore, the plaintiffs could not have a fair and impartial trial if the cause were tried at Warwick, but which they would have if the same were tried in London, or even at the assize town of an adjoining county.

The learned sergeant submitted, that, under the old practice, the venue could not be changed in an action upon a specialty. *Mondel v. Steele*, 8 M. & W. 640; and that the new rule — rule 18 of Hilary term, 1853, which provides that “no venue shall be changed without a special order of the court or a judge, unless by consent of the parties,” — had made no alteration in this respect.

[JERVIS, C. J. This is not an application founded upon the common affidavit.]

The only real ground suggested for changing the venue here, is, that the witnesses live in Warwickshire. But it would be a much greater inconvenience to the plaintiffs to be compelled to go to trial before a jury they have reason to believe would be hostile to them. There is no precedent for the application.

[JERVIS, C. J. O, yes; on special circumstances.¹]

At all events, the defendants should have come earlier.

[JERVIS, C. J. That will be considered in the costs.]

Field was not called upon to support his rule.

PER CURIAM. The court are of opinion that the rule should be made absolute, on payment of the costs of the application, and also of such costs as may have been rendered useless by the change of venue.

Rule, accordingly.

¹ See *Ramsden v. Skipp*, Com. B. Rep. 601; *Clulee v. Bradley*, Ib. 604, and *Begg v. Forbes*, Ib. 614.

In re Pike v. Newman.

In the Matter of the Arbitration between JAMES PIKE and SAMUEL
NEWMAN. PIKE v. NEWMAN.

January 22, 1854. ●

Attachment—Non-performance of Award.

Two actions of *A v. B*, and *B v. A*, and all matters in difference between the parties, were referred, the costs of the reference and award as to the said actions, to be in the discretion of the arbitrator. The award found that there was due from B to A 52*l.* 18*s.*, and directed that B should bear his own costs in the action brought by him against A, and also A's costs of that action; that A was entitled to recover 52*l.* 18*s.* in the action brought by him against B, and that B should pay that sum, on demand, to A, together with A's costs of the action; and that each party should bear his own costs of the reference, and half the expense of the award.

The action of *B v. A* had not proceeded beyond the writ, and consequently there were no costs due therein to A.

The agreement of reference having been made a rule of court, the rule being intituled, "In the matter of the arbitration between A and B; *A v. B*," and the 52*l.* 18*s.* and taxed costs of the action of *A v. B*, having been duly demanded, the court granted an attachment against B for non-payment of those two sums.

By agreement of the 15th of April, 1853, between Pike and Newman, reciting that Pike claimed to be entitled to the sum of 239*l.* 6*s.* 4*d.* from Newman, for work done, and goods supplied to or for him, and had commenced an action in this court in respect thereof; and that Newman claimed to be entitled to 284*l.* 4*s.* 4*d.* from Pike, for work done and goods supplied to or for him, and had also commenced an action in this court in respect thereof, it was agreed that "the matters in dispute in the said actions respectively, or in any way relating thereto, or arising out of the same, and all other matters and transactions whatsoever (if any) in difference between the said parties, and all claims and demands whatsoever which either of the said parties had or claimed against the other of them," should be referred to two arbitrators named, or an umpire—the costs, charges, and expenses, as well of and relating to the said reference and award, as to the said actions respectively, to be in the discretion of the said arbitrators or umpire.

The award was made by the umpire on the 15th of October, 1853, who found that there was due and owing by Newman to Pike, upon balance of account between them, upon taking into consideration all matters in dispute in the said actions respectively, and all claims and demands, and all other matters and transactions in difference between them, 52*l.* 18*s.* He further awarded that Newman should bear and pay his own costs and charges by him expended and incurred in the action instituted by him against Pike, and that he should also, on demand, pay to Pike the costs incurred by Pike about his defence to the said action; such costs to be taxed; and that no further proceedings be had or taken in the said action, save and except such proceedings (if any) as might be necessary for enforcing payment of the costs so awarded to Pike. He further awarded that Pike was

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entitled to recover in the action brought by him against Newman, the sum of 52*l.* 18*s.*, and no more, and that Newman should, on demand, pay that sum to Pike, together with Pike's costs of that action, to be taxed, and that no further proceedings should be had in such action, save and except such proceedings (if any) as might be necessary for enforcing payment of such sum of 52*l.* 18*s.*, together with such costs; and that each party should bear his own costs of the reference, and half the expense of the award.

The agreement of reference having been made a rule of court, and the sum awarded and the costs (which were taxed at 29*l.* 6*s.*) duly demanded,

Thrupp, on a former day in this term, moved for an attachment against Newman for non-payment of the several sums of 52*l.* 18*s.* and 29*l.* 6*s.* pursuant to the award. The rule making the agreement a rule of court was intituled "In the Matter of the Arbitration between James Pike and Samuel Newman — *Pike v. Newman*," making no mention of the action of *Newman v. Pike*. It appeared, however, that this latter action had not proceeded beyond the writ, and consequently there could be no costs due therein to Pike.

A rule *nisi* was granted, and, no cause being shown, was now made

Absolute.

SLIM v. THE GREAT NORTHERN RAILWAY COMPANY.

June 10, 1854.

Carriers — Railway Company — Consignment Note — Memorandum limiting Responsibility — Delivery to Company's Servant — Special Terms — Evidence.

- The course of business as to carrying pigs by a railway from H. to L., which the plaintiff S. well knew, was that on the delivery of the pigs, the porter who received them gave the drover of the owner a consignment note, which was signed both by the drover and the porter; that the drover then presented the consignment note to a clerk, who gave him a duplicate of a cattle note, to be presented on the delivery of the pigs at L. In the consignment note there was a notice that the company would not be liable for any articles, unless they were signed for by their clerks or agents. S., after having delivered a large number of pigs in the usual manner, sent six more to the station by X., who was going to take some of his own. At the station, X. got the usual notes for his own pigs, and told M., a porter, that the six pigs belonged to S., and M. said that he would take care of them; but no consignment note was made out or signed. The pigs were never delivered: —

Held, in an action brought by S. against the railway company for not delivering the pigs, that he could not recover, as there was no evidence that M. had any authority to contract for carrying the pigs, except in the usual manner, or that he held himself out as having such authority.

Slim v. The Great Northern Railway Co.

THIS was an action to recover the value of six pigs.

The first count of the declaration stated that the defendants were the owners of the Great Northern Railway, and of certain carriages used by them for the conveyance of cattle, pigs, goods, and chattels, upon the said railway from Hitchin to King's Cross, for hire and reward, and thereupon the plaintiff delivered to the defendants, and the defendants then accepted and received from the plaintiff, six pigs, to be carried for the plaintiff by the defendants in the said carriages of the defendants, upon the said railway, from Hitchin to King's Cross, and there to be delivered to the plaintiff within a reasonable time, for reward to the defendants in that behalf, and upon the terms and conditions, that the plaintiff undertook to bear all risk of injury by conveyance and other contingencies, and that, before he allowed his said pigs to be placed therein, he should examine the said carriages and be satisfied with their safety, the said reward being for the use of the railway carriages and locomotive power only, and that the defendants would not be responsible for any alleged defects in their carriages or trucks, unless complaint were made at the time of booking, or before they left the station, nor for any damages, however caused, to the said pigs travelling upon their railway, or in their vehicles; and that the plaintiff had examined the said carriages, and was satisfied with their safety; yet the defendants, not regarding their duty in that behalf, did not, within such reasonable time, carry the said pigs, nor deliver them to the plaintiff.

Second count in trover.

Pleas — first, not guilty; secondly, as to the said count, a traverse of the delivery and acceptance of the pigs to be conveyed on the terms alleged.

At the trial, before Williams, J., at the London Sittings, in Trinity term, the following facts were established by the evidence. The course of business with respect to the carrying of pigs and cattle, of which the plaintiff was well aware, was this: The owner, or his drover, took the pigs to the proper porter at the railway, who counted them, and made out a consignment note, stating the number of the trucks, the number of pigs, and the names of the consignor and consignee; and this note was signed by the porter, and by the owner or his drover. The note was then taken by the drover to the defendants' booking clerk, and handed to him, and he made out from it a cattle ticket in duplicate, which was signed by the drover; and the drover then paid the carriage. The drover then took the cattle ticket to London with him, and handed it to his master, and it was used as a voucher for the delivery of the pigs at London. The consignment note contained a notice, that "the terms upon which every sender agrees with the above-named company, that his goods shall be received, carried, delivered, or warehoused, if necessary, are as follows: that is to say, the said company shall not be accountable for any articles unless the same be signed for as received by their clerks or agents." The cattle tickets contained a stipulation throwing the risk of deficiency in the carriages on the senders, as stated in the first count of the declaration. Cattle were occasionally sent up without prepay-

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ment, but not without a consignment note. On the occasion in question, the plaintiff sent 203 pigs in two parcels, from Hitchin to London, for which his drover signed two consignment notes and got two cattle-tickets according to the usual course of business; and those pigs were duly delivered. After the delivery of the 203 pigs, the plaintiff bought six more, and asked a man named Lewis, who was going to send thirty-two pigs on his own account, by the same train, to take them to the station along with his own. Lewis accordingly took his own and the plaintiff's six pigs to the station just before the train started, and Morgan, one of the porters of the company, on being told by Lewis that the six pigs belonged to Slim, the plaintiff, and that they were going along with Slim's other pigs, said that he would put them with Mr. Slim's directly. The six pigs were never delivered to the plaintiff at London, or elsewhere; and it did not appear that any consignment note had been signed for them, or any cattle ticket given. Upon this evidence, it was contended, on the part of the defendants, that the plaintiff should be nonsuited, there being no evidence that the defendants had ever contracted on any terms except according to the usual course of business, and that if it was proved that the porter received the pigs, he acted without authority, and in opposition to the ordinary course of business; and, also, that it was not proved that the defendants undertook to carry the pigs for hire and reward. The learned judge left it to the jury to say whether Morgan had received the pigs; and the jury having found in the affirmative, he directed a verdict for the plaintiff, reserving leave to the defendants to move to enter a nonsuit, and for the plaintiff to amend his declaration, if necessary.

A rule *nisi* having been obtained, accordingly, by the defendants, for setting aside the verdict and entering a nonsuit,

June 10. *Byles*, Serg., and *Charnock*, showed cause. The first count of the declaration is founded upon the terms in the cattle note, but, if there be any variance, leave has been given to the plaintiff to amend. In the first place, Morgan, the porter, had authority to receive the pigs, and to bind the company under all the circumstances of the case. This is one of the cases of emergency, alluded to in the recent case of *The Taff Vale Railway Company v. Giles*, 23 Law J. Rep. (N. S.) Q. B. 43; s. c. 22 Eng. Rep. 202, where it was held to be the duty of a railway company, trading as carriers, to have servants authorized to give directions and act for the company on all occasions, as the exigency of the traffic may require. It was reasonable and proper, that there should be some person on the spot ready to receive and dispatch such goods and cattle as might arrive, and Morgan was a person so acting, and the company must, therefore, be bound by his acts.

[MAULE, J. In the case just cited, where the general superintendent of the railway had allowed the plaintiff to plant some quicks near the railway, to keep them alive, and it was a question whether that was within the power of the superintendent, I showed why, in my opin-

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ion, it was competent for the company, (that is to say, not beyond their duty as carriers,) to do that which was necessary to keep the quicks alive. I thought the company would not have been going out of their way in planting the quicks; but, it was only decided in that case that a person, such as the superintendent there was, might bind the company as to matters affecting them as carriers.]

In the second place, even if no authority was given by the company, to Morgan, to enter into the contract to carry the pigs without the consignment note, yet as there was a delivery to a person whom the company permitted to appear to have authority, they must be bound by his acts. This view of the case is supported by *Walker v. The York and North Midland Railway Company*, 8 Exch. Rep. 341; s. c. 22 Eng. Rep. 315; and *Scothorn v. The South Staffordshire Railway Company*, 22 Law J. Rep. (n. s.) Exch. 121; s. c. 18 Eng. Rep. 553.

[JERVIS, C. J. There is a count in trover here. If Morgan had authority to receive the pigs into his possession, but had no authority to let them go by the train without a ticket, the plaintiff might have said, "I have changed my mind. I shall not send them." Then, if the pigs were not given up, that would be trover.]

The plaintiff is entitled to recover on the count in trover.

Chambers and *Wordsworth*, in support of the rule. No leave was given to move on the trover count, nor was it relied upon at the trial. The plaintiff is not entitled to recover on the first count. The company was not liable for not carrying the pigs safely, unless a consignment note was duly signed, and of this the plaintiff had as ample notice as if on the occasion when the pigs were delivered to Morgan, one of the directors of the company had told the plaintiff himself, that the company would not hold itself liable, unless the note was signed. Here, as in the case of *Austin v. The Manchester, Sheffield, and Lincolnshire Railway Company*, 20 Law J. Rep. (n. s.) Q. B. 440; s. c. 5 Eng. Rep. 329, the special terms of the memorandum disprove the bailment on the terms stated in the declaration. In *Walker v. The York and North Midland Railway Company*, where the company had made very improper stipulations on their own behalf, and it was sought to charge them as common carriers, it was held, that the contract was only a special one on the terms of their notice, and that it was immaterial that the plaintiff had objected to their special terms. Even if the plaintiff were to amend, and charge the defendants as common carriers, he would still be in a difficulty. The evidence shows only that Morgan, as a railway porter, received the pigs for the purpose of their being carried in the ordinary course, as soon as the plaintiff had complied with the rules of the company. The evidence would not support the declaration if amended. The case of *The York, Newcastle, and Berwick Railway Company v. Crisp*, 23 Law J. Rep. (n. s.) C. P. 125; s. c. 25 Eng. Rep. 396, shows that the company could not be charged as common carriers of cattle. There was no emergency in this case, for Lewis had time enough to get the proper documents for his own pigs, and there would have been no

difficulty, if the plaintiff had had a proper person at the station to look after his property.

JERVIS, C. J. It seems to me that this rule ought to be made absolute. The question on the count in trover has been disposed of. On the first count of the declaration, amended or not amended, according to my view of the case, the plaintiff cannot recover. In the usual course of business as carried on by the plaintiff, he received, on the delivery of pigs, a paper which gave him notice that the company would not be responsible unless the pigs were signed for as received by their clerks or agents. In this state of things he sent these pigs to the station, by Lewis, who did not profess to be a servant of his, with whom Morgan might enter into a contract, other than the usual one.

MAULE, J. I think that if the true construction be put on the evidence, there was not enough to warrant the jury in finding that the defendants entered into the contract contended for by the plaintiff. The plaintiff, after sending off 203 pigs, in the usual course of business, buys six more, which he is anxious to send in the same way, and he gets Lewis to take them to the station. Lewis, with respect to his own pigs, deals in the usual manner, and tells Morgan, the porter, that these six pigs belong to Slim. Morgan tells Lewis to take care of his own, and he, Morgan, will take care of the others; meaning that he would take care of them, and if the plaintiff, or somebody else for him, should do what was requisite according to the ordinary course, then the company would be responsible for the pigs. I do not think that what Morgan said or did, amounted to making a contract on behalf of the company, or that he took upon himself to make any such contract.

CRESSWELL, J. I am of the same opinion, both on the ground that there was no evidence of any authority to Morgan to bind the company without the usual documents, and, also, that it did not appear that he held himself out as having such authority.

CROWDER, J. It appears to me that the plaintiff must have known that Morgan had no power to bind the company on any but the usual terms.

Rule absolute.

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BAMFORD v. CHADWICK and others.

June 3, 1854.

Will, Construction — "Die without leaving Issue" — Personality and Realty.

A testator devised freehold and leasehold property to his son John, his heirs and executors, so far as the nature of the property would admit, and in case of his decease without leaving issue, gave the same to his son William and his heirs. He devised other property to his son William and his heirs, with a similar proviso in favor of John. And in the event of the decease of both John and William without leaving issue, he gave both properties to his daughter M. : —

Held, that the combination of personalty and realty in the same gift was not sufficient to vary the settled construction of the words "dying without leaving issue" in the case of realty, and that, therefore, John and William took estates tail in the freeholds respectively devised to them, with cross-remainders in tail in the same.

EJECTMENT to recover possession of land at Rochdale, in the county of Lancaster.

The case came before the court on a special verdict, and the question was as to the construction to be put upon the will of one John Stott, the material parts of which were as follows: I give, devise, and bequeathe unto my son John Stott all my estates called Benthouse and Gatehouse, in the parish of Rochdale, in the county of Lancaster, save and except the several closes, inclosures, and parcels of meadow and pasture land and building, being part of the said Benthouse and Gatehouse estates, and the privileges hereinafter mentioned, and given and bequeathed to my son William Stott; also all these two leasehold messuages, cottages, or dwelling-houses situate at Gatehouse aforesaid, and in the tenures or occupation of John Butterworth and Thomas Wike; to hold the same and the appurtenances (except as aforesaid) unto my said son, John Stott, his heirs, or assigns, forever, or, according to the nature or tenure thereof, charged and chargeable nevertheless, and I do hereby charge the same estates, tenements, and hereditaments, with the payment of the sum of 300*l.*, which I hereby give and bequeathe to my daughter, Sarah Stott, during the term of her natural life; also charged and chargeable, and I do hereby charge the same estates, tenements, and hereditaments with the further sum of 300*l.*, which I hereby give and bequeathe unto my daughter Martha, the wife of William Sutcliffe, during the term of her natural life. Provided, that in case of the decease of my said son, John Stott, without leaving lawful issue, then I give and devise the same estates, tenements, and hereditaments to my son, William Stott, to hold the same to him, his heirs, and assigns, forever, or, according to the nature or tenure thereof; and I do will, order, and direct that my said son, John Stott, his heirs and assigns, shall pay to my daughter Sarah lawful interest upon the said legacy or sum of 300*l.* so given and bequeathed to her, and charged as hereinbefore mentioned, during

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the term of her natural life by equal half-yearly payments, the first of which I order and direct shall be made to her within six months after the decease of the survivor of me and my said wife.

Provided, also, and it is my will and mind that in case of the decease of my said daughter, Sarah, without leaving lawful issue, then I will, order and direct, and I do hereby give and bequeathe the said legacy or sum of 300*l.* so given and bequeathed to my said daughter, Sarah, to my daughter, Susan, during the term of her natural life, and the interest to be paid in like manner; and in case of her decease without leaving lawful issue, then it is my will and mind, and I do hereby give and bequeathe the said legacies to my said sons John and William Stott, equally betwixt them; and provided, that in case of the decease of my said sons without leaving issue, then it is my will and mind, and I do hereby give and bequeathe the said legacies equally amongst my daughters then living, share and share alike, (except as to my daughter, Martha, and her issue,) leaving lawful issue, and I will, order, and direct that such issue shall take their parent's share, and if but one, that one only; provided, that in case of the decease of my said daughter, Martha, leaving lawful issue or children under age, I will, order, and direct that such children shall receive their parent's share, if more than one, equally amongst them as they attain their respective ages of twenty-one years, and that the interest in the mean time shall be applied in their bringing-up, maintenance and education, and in case of only one child, to that one child only. Provided, also, that in case of the decease of my said daughter, Martha, without leaving lawful issue, then I will, order, and direct, and I do hereby give and bequeathe the said legacy or sum of 300*l.* so given to her to my said sons, John and William Stott, equally between them, share and share alike. Also, I give, devise, and bequeathe unto my son, William Stott, all that my tenement, farm-building and premises situate at Wuerdle, in the parish of Rochdale aforesaid, also all those several closes, inclosures, &c., being parcel of the said Benthouse and Gatehouse estates not hereinbefore disposed of, commonly called, &c., to hold the same several, and respective tenements, hereditaments, and privileges, with their several and respective appurtenances, &c., unto my son, William Stott, his heirs and assigns forever, or according to the nature and tenure thereof, charged and chargeable nevertheless as hereinbefore mentioned. Provided, also, and it is my will and mind, and I do hereby declare, that in case of the decease of my son, William Stott, without leaving lawful issue, then I give, devise, and bequeathe the same tenements, hereditaments, and premises unto my said son, John Stott, his heirs and assigns forever, according to the nature and tenure thereof. Also, I give, devise, and bequeathe unto my daughters, Sarah Stott and Susan Stott, the reversion of the messuage or dwelling-house in the tenure of my sisters, Mary Stott and Sarah Stott, bequeathed to them for life in my late father's will, and the appurtenances, to hold them from and immediately after the decease of the survivor of my said sisters, for and during their joint lives and the life of the survivor of them. Provided, that in case of the marriage of either of my said daughters, Sarah or

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Susan, I will and direct that the benefit in the said dwelling-house and appurtenances shall from thence cease and go to the other of them; and in case of the marriage or death of the survivor, then I give, devise, and bequeathe the reversion in the said messuage or dwelling-house and appurtenances to my son, William Stott, to hold the same to him, his heirs, and assigns, forever, or according to the nature or tenure thereof, charged and chargeable nevertheless, and I do hereby charge the said tenements and hereditaments given and devised to him with the payment of the sum of 300*l.*, which I hereby give and bequeathe to my daughter Molly, the wife of Edmund Bamford, to be paid to her within twelve months next after the decease of the survivor of me and my said wife and my sisters, Mary and Sarah Stott; also charged and chargeable, and I do hereby charge the said tenements and hereditaments with the payment of the further sum of 300*l.*, which I hereby give and bequeathe to my daughter Susan Stott for and during the term of her natural life; and it is my will and mind and I do hereby order and direct that my said son, William Stott, do pay to my said daughter, Susan Stott, lawful interest for the same legacy or sum of 300*l.*, so by me given and bequeathed to her by half-yearly payments, the first of which I will, order, and direct shall be paid within six months next after the decease of me and my said wife; provided that in case of the decease of my said daughter, Susan, without leaving lawful issue, then it is my will and mind, and I do hereby give and devise the said legacy or sum of money so bequeathed to my said daughter, Susan, to my said daughter, Sarah, during the term of her natural life; and I will, order, and direct my said son, William Stott, his heirs, or assigns, to pay my daughter, Sarah, lawful interest in like manner on the said legacy or sum of 300*l.* so given and bequeathed to her and charged as hereinbefore mentioned. Provided, also, and it is my will and mind, that in case of the decease of my said daughter, Susan, without leaving lawful issue, then I will, order, and direct, and I hereby give and bequeathe the said legacy or sum of 300*l.* so given and bequeathed to my daughter, Susan, to my said sons, John Stott and William Stott, equally, share and share alike. And provided, that in case of the decease of my said sons, without leaving lawful issue, then it is my will and my mind, and I do hereby give and bequeathe the said legacy, or sum of money, equally amongst my daughters, then living, share and share alike (except as to my daughter, Martha, and her issue); and in case of the decease of any of my said daughters, (except my daughter, Martha, and her issue,) leaving lawful issue, I will that such issue shall take their parent's share, and if but one, to that one only. Provided, further, that in case of the decease of both of my sons, John and William Stott, without leaving lawful issue, then it is my will and mind, and I do hereby give, devise, and bequeathe my real and leasehold estates hereinbefore given and devised to them respectively, to my said daughter, Molly, the wife of Edmund Bamford, to hold the same to her, her heirs and assigns, or according to the nature and tenure thereof.

John Stott, the testator, died in 1812, seised in fee of the messuages, &c., in question. William, his son, died in 1817, unmar-

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ried and without lawful issue. John, the other son, on the 7th or 8th of November, 1840, being then in the actual possession or in the receipt of the rents and profits of the several messuages, &c., mentioned in the writ, executed a disentailing deed, and thereby conveyed the several messuages, &c., to William Roberts and his heirs, to hold the same to such uses as he, the said John Stott, party thereto, should by any deed or deeds appoint, and in default of appointment to the use of the said John Stott, his heirs and assigns absolutely. The same last-mentioned John Stott died in 1853, unmarried, and without lawful issue, having, by his will, devised the premises in the writ mentioned to the defendants for life; and Molly, the daughter of the first-mentioned John Stott, died in 1826. The plaintiff was her heir at law, and he contended that in consequence of the decease without leaving issue of John Stott and William Stott, the sons of the testator, John Stott, the estate in fee which by the will was given to Molly, the wife of Edmund Bamford vested in the plaintiff as her heir; and that the disentailing deed executed by John Stott, the son, and also his will, were inoperative as against the plaintiff.

Cowling, (*Hugh Hill*, with him,) for the plaintiff. If in the devise of the word "children" were substituted for "issue," the plaintiff must succeed. But here it is plain that "issue" means "children." The reference to the parent restricts the word "issue." *Pruett v. Osborne*, 11 Sim. 132; *Barker v. Barker*, 21 Law J. Rep. (N. S.) Chanc. 794; s. c. 13 Eng. Rep. 172; *Sibley v. Perry*, 7 Ves. 522. Again, the words "in case of the decease of my said sons without issue" mean leaving issue at their deaths, and not an indefinite failure of issue.

[MAULE, J. No doubt, *prima facie*, "dying without leaving issue" means leaving issue at the time of the decease.]

The courts have always been astute in avoiding the application of a rule good in itself, but frequently harsh in its application. *Doe d. Gallini v. Gallini*, 3 Ad. & E. 340; *Porter v. Bradley*, 3 Term Rep. 143; *Roe v. Jefferey*, 2 M. & S. 92; *Doe d. Smith v. Webber*, 1 B. & Ald. 713; *Glover v. Monckton*, 3 Bing. 13, and *Doe d. Jones v. Owens*, 1 B. & Ad. 318. In the latter case, Bayley, J., referring to *Roe v. Jefferey*, says, that the word "leaving" would seem to make some difference. At least, it may mean leaving at the death of the person in question, and will be construed so as to effectuate the intention. Here the intention of the testator is clearly shown by his combining leasehold and freehold property in one gift. The court will, therefore, not allow the ordinary hard rule to apply.

Mellish, for the defendants. The case is governed by the authorities. The word "leaving" is never construed to refer to the death of the person in the case of realty, in the absence of a clearly expressed intention. *Doe d. Todd v. Duesbury*, 8 Mee. & W. 514; and *Doe d. Simpson v. Simpson*, 4 Bing. N. C. 333, show that this rule of construction is well settled. In both those cases the rule was put in force, although it defeated the remainder over. It is con-

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tended, on the other side, that "issue" must mean children or issue living at the death, because the testator has used the same expression with respect to annuities and legacies, in which case it must certainly be so construed. But a different rule prevails in the case of personalty and realty. In the former case, "leaving" refers to the time of death. 2 Jarman on Wills, 417, citing *Forth v. Chapman*, 1 P. Wms. 663, where realty and personalty were included in the same devise. The argument comes to this; because the testator knew the law as to personalty, therefore he misunderstood the law as to realty. *Porter v. Bradley*, and *Roe v. Jefferey* are explained in *Wood v. Baron*, 1 East, 259, by Lord Kenyon. In the former case the decision turned on the word "behind;" in the latter, the rule was departed from because the devise over was for life; and that was also the case in *Glover v. Monckton*.

Cowling, in reply. It is admitted on the other side that the rule is a technical one. In the cases cited for the defendant, the courts were bound to give effect to the rule, having nothing else to guide them. But the courts will always escape from the strict construction when there is sufficient for that purpose, as in the present case.

[JERVIS, C. J. In *Cole v. Goble*, 22 Law J. Rep. (N. S.) C. P. 148; s. c. 20 Eng. Rep. 234, my brother Williams says, that the doubt expressed by Lord Kenyon, in *Porter v. Bradley*, as to the decision in *Forth v. Chapman*, has long ago been stifled.

MAULE, J. According to the plaintiff's argument, "issue" is equivalent to "heirs of the body." So construed, the devise gives an estate tail to John, with remainder to William. If it can be construed as a remainder, it cannot be construed as an executory devise.]

In *Doe d. Todd v. Duesbury*, the court admitted the strict rule of construction to be a good one, but they proceeded to interpret the will according to the intention; it is, therefore, no authority against the plaintiff when contending that the clear intention of the testator should be carried out if possible.

JERVIS, C. J. I am of opinion that our judgment must be for the defendants, for that John took an estate tail, and not an estate in fee with an executory devise over. It is admitted, that the words used in the proviso following the gift to John would generally convert the fee originally given to him into an estate tail. But it is said, that there is a clear intention shown that the words should not have that effect in the present case. It is not denied by the defendants' counsel that the court will put a different construction on the words to effectuate a clear intention. But here the court is asked to deduce such intention, merely from the fact of the combination of personalty and realty in one gift. Now, it is well established, that the construction to be put on the words "dying without leaving issue," depends on the nature of the property devised; that in the case of a devise of realty, they will be construed to mean an indefinite failure of issue, but in the case of a devise of personalty, a failure of issue at the

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time of the death of the first taker. We are, therefore, asked to conclude that, because the testator knew the meaning of the words as applied to a devise of personalty, he was, therefore, ignorant of their meaning when applied to a devise of realty. Nothing but the clearest evidence of intention can justify a departure from a settled rule of construction, and that is wanting in the present case.

MAULE, J. This will was evidently drawn by a person who knew the distinction between real and personal property, for, to the devise to John and his heirs forever, he adds, "or according to the nature and tenure thereof;" and the same words are repeated in the proviso, showing clearly that he knew the difference in the application of the law when applied to a devise of realty, and when applied to a devise of personalty. The same words are used in the devise to William, of the other property, and also in the proviso in favor of John, in the event of William dying without leaving lawful issue. Then comes a third proviso, which provides, that in case of the decease of both John and William without leaving lawful issue, the property devised to them respectively is to go to Molly, her heirs and assigns forever, "or according to the nature and tenure thereof." It is clear, that the same estate is intended to be given to Molly, on the happening of two events, as was intended to be given to John and to William, on the happening of one event. The same words are used in all three devises, and the same construction is to be put upon each. Then, what the meaning of the words "without leaving lawful issue" is, has been long well established. If the devise be of real estate, they mean "a general failure of issue," but if the devise be of leaseholds or personalty, they mean "without issue living at the death of the first taker;" and the reason of this distinction is well explained in the judgment of Tindal, C. J., in *Doe d. Simpson v. Simpson*. The plaintiff's counsel contends, that an intention is indicated in this will, that a different construction should prevail; but I think that he has not shown that. Where a testator does not sufficiently indicate what his intention is, certain rules have been laid down to guide the courts in construing his will, in order that some effect may be given to it. In the present case, no intention is shown to counter-vail the well-established rule of construction; and the effect of applying that is to give John an estate tail in the property in question, which was well barred by the disentailing deed of 1840. The defendants therefore, who claim through him, are entitled to our judgment.

CRESSWELL, J. I am of the same opinion. We first have a devise to John in fee, followed by a proviso, that in case he should die without leaving issue, the estate should go to William. Now, the words "dying without issue" sometimes enlarge the previous estate, as in *Doe d. Todd v. Duesbury*, and in other cases cut it down. That is independently of the effect to be given to the word "leaving." In the earlier cases it was contended, that the words "without leaving lawful issue," meant issue living at the death of the first taker. But the cases of *Doe d. Cadogan v. Ewart*, 7 Ad. &

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E. 636, and *Doe d. Todd v. Duesbury*, decided, that the word "leaving" has not that effect. But on the part of the plaintiff, it is said, that the testator has here shown his intention, that the words should not receive the construction which the court puts on them when there is nothing else to guide them. And this intention is deduced from the union of personalty and realty in one gift. But no conclusion can be drawn from this circumstance, since a different rule of construction obtains in the two cases.

Judgment for the defendants.

BENGE v. SWAINE, administratrix.

June 14, 1854.

Practice and Procedure — Administratrix — Costs on Discontinuance.

The defendant having died after issue joined and notice of trial given, a suggestion of his death was duly made, and his administratrix appeared and pleaded to the suggestion. The plaintiff afterwards applied to a judge at chambers, for leave to discontinue on payment of the costs of the pleas to the suggestion, but the judge made the usual order on payment of full costs:—

Held, that the order was right; for that the 138th section of the Common Law Procedure Act put the administratrix in the same position as if she had been the original defendant in the action.

In this case, the plaintiff had declared against Thomas Page for obstructing certain sewers of the plaintiff; the defendant pleaded not guilty, and traversed the plaintiff's right to the sewers. Issue was joined on the 3d of March, 1853, and notice of trial was given for the Sussex Assizes, to be held on the 14th of March. On the 13th of March, the defendant died intestate, and on the following 30th of September, Mary Swaine took out administration of his effects; and, on the 10th of February, 1854, the plaintiff made a suggestion in the copy of the issue of the death of Thomas Page, and that Mary Swaine was administratrix, and copies of the suggestion and of the writ in the action were duly served on her, on the 15th of April, together with a notice requiring her to appear. She, accordingly, entered an appearance as administratrix, on the 21st of April, and on the 27th of April obtained an order of Cresswell, J., to plead, and did plead to the suggestion, first, that none of the injuries complained of were committed, by the intestate, within six calendar months next before his death; and, secondly, that the administratrix was not served with a copy of the writ or suggestion, or with the notice within six calendar months next after she took upon herself the administration. On the 8th of May, a summons was taken out calling on her to show cause why the plaintiff should not be at liberty to discontinue, on

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payment of the costs of the pleas to the suggestion; and, on the 9th of May, Maule, J., before whom cause was shown, made the usual order that the plaintiff should be at liberty to discontinue on payment of costs, the plaintiff undertaking to pay such costs when taxed, and consenting that, in default of payment of such costs, within ten days from the 30th of May, the defendant should be at liberty to sign judgment of *non pros*. The costs were taxed on the 18th of May, and the master gave his allocatur to the defendant for 57*l.* 1*s.* 4*d.*, being the whole costs of the cause.

June 9. *Norman* obtained a rule *nisi*, calling upon the defendant to show cause why the master should not be at liberty to review his taxation, or why, on payment by the plaintiff to the defendant, or her attorney, of the costs occasioned by the order of Maule, J., the plaintiff should not be at liberty to abandon the said order.

Hance now showed cause. The plaintiff is only to be at liberty to discontinue on the usual terms, that is, on payment of costs generally, the whole costs of the cause. By the 138th section of the Common Law Procedure Act, 15 & 16 Vict. c. 76, the administratrix is, so far as the present question is concerned, placed in the same position as the original defendant would have been in if he had lived. That section provides that "the pleadings upon the declaration and the pleadings upon the suggestion shall be tried together, and, in case the plaintiff shall recover, he shall be entitled to the like judgment in respect of the debt or sum sought to be recovered, and in respect of the costs prior to the suggestion, and in respect of the costs of the suggestion, and subsequent thereto, he shall be entitled to the like judgment as in an action originally commenced against the executor or administrator." The plaintiff, therefore, if the cause had gone to trial against the administratrix, and he had recovered, would have been entitled to costs from the commencement of the cause.

[JERVIS, C. J. Nothing is said as to what is to happen in the event of the verdict being for the administratrix.]

The whole scope of the section is to put her in the position of the original defendant, and he would have been entitled to full costs if he had succeeded.

[JERVIS, C. J. Suppose, at the trial, the jury find that the deceased defendant did obstruct the sewers, but that the plaintiff did not prosecute the suit against the administratrix within six calendar months, after she had taken out administration, what would be the result? The plaintiff says, it becomes a question, then, of jurisdiction, because, if the action was not prosecuted in due time, it does not survive.]

Then, it is like a plea of the statute of limitations; it is not a plea of want of jurisdiction.

[JERVIS, C. J. Suppose the issues as to the obstruction were found for the plaintiff, would the administratrix be liable for damages?]

Yes, *de bonis testatoris*, but not *de bonis propriis*.

[MAULE, J. The plaintiff is, in all cases, provided for by the 138th section, to be entitled to the like judgment as if the action had been

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originally commenced against the administratrix. If she does not plead *plene administravit*, I suppose she would be liable *de bonis propriis*, because, in the absence of such a plea, her *bona propria* would be taken to be *bona testatoris*.]

The case would be the same as if a new action had been commenced, within the proper time under the 3 & 4 Will. 4, c. 42, s. 2, against the administratrix. The plaintiff, if he recovered, would be entitled to damages and the whole costs of the cause, and the defendant would be entitled to the whole costs if he succeeded.

[MAULE, J. I have no doubt but that my order, allowing the plaintiff to discontinue on payment of costs generally, was right; and it is not suggested that the master has allowed too much.]

Norman, in support of the rule. The prosecution of the suit against the administratrix, within six calendar months from the death of the intestate, was a condition precedent to the plaintiff's right to go on. The issue raised as to that, is first to be tried, and if found for the defendant, the judge and jury have no further jurisdiction; for the suit has abated, and it is then in the same condition as if there were no suggestion on the record. In *The King v. Cohen*, 1 Stark. 511, after issue joined, one of the plaintiffs died; no suggestion was entered on the record; and Lord Ellenborough held, that the trial was extra-judicial, and that a witness in it was not indictable for perjury, the entry of a suggestion being a condition precedent, under the 8 & 9 Will. 3, c. 11, s. 7, to the plaintiff going on. It is said, the defendant's plea is like a plea of the statute of limitations; but, it is more in the nature of a plea in abatement; and in such case, if the plaintiff confesses the plea to be true, as he confesses the defendant's plea to be true in this case, by asking to discontinue the action, no costs are allowed. Or it may be likened to a plea *puis darrein continuance*, in which case, if the plaintiff proceeds with the action and the defendant succeeds, the latter is not entitled to any costs incurred previously to the plea. So, also, in the case of a repleader, no costs are allowed to either party, nor, except in the discretion of the court, when a new trial is granted.

[JERVIS, C. J. That may be so in those cases, but this is not one of them. You must satisfy us that the administratrix would not have been entitled to the general costs of the cause, if every issue had been found against the plaintiff. The 138th section does not say what judgment is to follow in the event of the defendant succeeding; but I take it that the legislature intended to put both parties in the same position, so far as the present question is concerned, as if the administratrix had been the original defendant on the record; they meant that when the cause was in a certain state of ripeness, and the defendant happened to die, all the money that had been previously spent in the cause, should not be thrown away, but that the cause should proceed just as if he had not died.]

[MAULE, J. The plaintiff says now: "I have improperly brought the present defendant into court, and I wish to discontinue without paying full costs." That is rather a reason why he should pay them.]

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Then, it is submitted that the 138th section only applies to cases where the action survives generally, and not to the present case.

JERVIS, C. J. I am of opinion that this rule should be discharged. There is no doubt of the application of the rule as to costs contended for by the plaintiff, in the case of a plea of abatement, or of a plea *puis darrein continuance*; but, it is not applicable here, for this is neither the case of a plea in abatement, nor of a plea *puis darrein continuance*, but a case where the plaintiff, for some reason or other, wishes to discontinue the action he has brought against the administratrix; and the question is, whether he is to be allowed to do so on other than the usual terms, namely, the payment of costs generally. Now, the object of the Common Law Procedure Act, section 138, was, as I have already stated, to place the present defendant in the same position as if she had been the original defendant in the action. Formerly the plaintiff, on the death of the original defendant, would have been obliged to commence a fresh action against the administratrix; but the legislature has now said, it is a pity that the money already spent in the cause should be all thrown away: let the cause proceed just as if it had been commenced originally against the administratrix. If, then, in that case, it had gone on to trial, and the plaintiff had succeeded, he would have been entitled to full costs. Some difficulty would seem to arise from nothing being said in the 138th section as to what the judgment is to be if the defendant succeeds; but common justice would require that she should be entitled to the usual rights of a defendant, and nothing has been said to show that she, also, would not be entitled to full costs if she had succeeded. If so, this is the ordinary case where a plaintiff wishes, for reasons best known to himself, to discontinue; and my brother Maule has made an order giving him leave to do so, with the usual condition, "upon payment of costs." That order, I think, was quite right, and ought not to be set aside. This rule will, therefore, be discharged, with costs.

MAULE, J. I am of the same opinion. I thought this was an ordinary case where the plaintiff wanted to discontinue his action, and that he could only do so, as is usual, on payment of costs; and I think so still. He chose to go on with the action against the administratrix, and she having been once made a defendant, has a right to have the action determined, and to receive such costs as she would have been entitled to, had the action been tried out, and she had succeeded. The court is not to inquire whether the action was well or ill brought originally, nor how the questions in issue would have been decided; possibly, they might have been decided in favor of the plaintiff; but all the court knows is, that, for some reason, the plaintiff wants to discontinue. Now, if the plaintiff had gone on to trial, and succeeded, he would have recovered all his costs, the same costs as he would have recovered if the action had been originally commenced against the present defendant; that is what the 138th section says. Surely, the defendant ought to be put in the same position if she suc-

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ceeds; and nothing has been said to show that she ought not, or that she would not be entitled to full costs in the event of her succeeding. I think, therefore, that the plaintiff ought not to be allowed to discontinue on other than the usual terms, and that this rule should be discharged.

CRESSWELL, J. I am entirely of the same opinion. The substance of the 138th section is, that where the cause of action survives, whether it be by common law or by statute, the plaintiff is at liberty to incorporate against the executor or administrator, all the steps in the proceeding which he had heretofore taken against the original defendant. The plaintiff has done that here; he had a perfect right to do so, but he must take the consequences of having done it. The ordinary rule as to costs must prevail.

CROWDER, J. I am of the same opinion. The administratrix, by the 138th section of the Common Law Procedure Act, is put in the same position as if she had been the original defendant in the action. If the original defendant had lived, and the plaintiff had discontinued, and there had been judgment of *non pros.* against him, the defendant would have been entitled, under the 4 Jac. 1, to his full costs. The administratrix is to be put in the same position. But the plaintiff wishes to avoid judgment of *non pros.*, and he, therefore, asks leave of the court to discontinue, and the court imposes on him the ordinary condition, namely, the payment of full costs.

Rule discharged, with costs.



WILKIN v. REED.

June 8, 1854.

Amendment at Nisi Prius—Common Law Procedure Act—Real Question in Controversy.

Section 222 of the Common Law Procedure Act only authorizes such amendments to be made by a judge at Nisi Prius as are necessary for determining the real question in controversy between the parties, that is, the real question which the parties intended to have tried, not any question which may come in controversy in the course of the trial, and which was not in controversy before. What the real question in controversy is, is a matter of fact to be determined at the trial by the judge, from the pleadings and the evidence.

The declaration alleged, that the defendant fraudulently represented to the plaintiff that the reason why the defendant had dismissed P. (a clerk) from his employ, was the decrease in the defendant's business, and that the defendant recommended the plaintiff to try P. and knowingly suppressed the fact that P. had been dismissed on account of dishonesty. The evidence was, that although P. had been guilty of dishonesty while in the defendant's employ, and the defendant had not mentioned that fact to the plaintiff, yet the reason for his dismissal was that given by the defendant; and whether the defendant had fraudulently

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suppressed the fact of P.'s dishonesty had not been in controversy between the parties before the trial, but only whether the defendant had given the true reason for dismissing P. : —

Held, that the judge at Nisi Prius had rightly refused to allow the declaration to be amended by striking out the allegation that the defendant fraudulently represented the reason of dismissal, and substituting for it an allegation that the defendant fraudulently suppressed the fact that P. had been guilty of dishonesty.

THE declaration stated, that, during all the time hereinafter mentioned, the plaintiff practised as an attorney and solicitor, and carried on business as such. That one Pargeter applied to the plaintiff to employ him as clerk of the plaintiff in the plaintiff's said business, of which the defendant at the time of the false and deceitful representations and assertions made by the defendant as hereinafter mentioned, had notice. That Pargeter had, before the time of committing the said grievances by the defendant, been in the employment of the defendant and his partners, carrying on business as attorneys and solicitors, and had ceased to be in such employment; and thereupon, the defendant, well knowing the premises, but intending to deceive and defraud the plaintiff, and to induce the plaintiff to employ Pargeter as clerk of the plaintiff in the plaintiff's said business, falsely, deceitfully, and fraudulently [represented and asserted to the plaintiff that the principal reason of Pargeter having left the employ of the defendant, and his said partners, was the alteration that had recently been made in the practice of common law by the Common Law Procedure Act, and the reduction of the profits of that branch of their business; that the only branch of the profession in which the defendant considered Pargeter deficient, was chancery; but that, with that exception, considering the nature of the plaintiff's business, the defendant thought the plaintiff would find Pargeter very useful, and that the defendant] recommended the plaintiff to try Pargeter, and the defendant then knowingly suppressed and concealed from the plaintiff, the fact that Pargeter had been [dismissed from the employment of the defendant and his said partners, on account of the dishonesty of Pargeter]; by means and in consequence of which said false representations and assertions of the defendant, the plaintiff, believing and relying on the truth of the said representations and assertions, and not knowing or believing to the contrary, and induced thereby, afterwards took Pargeter into his, the plaintiff's, employ as clerk in the plaintiff's said business, and Pargeter entered upon the said employ, and continued for some time therein; whereas, in fact, as the defendant at the time of making the said representations and assertions, well knew, [the principal reason of Pargeter having left the said employ of the defendant and his said partners, was not the reason so assigned, represented, and asserted by the defendant, that, as the defendant at the time of making the said representations and assertions, well knew the principal reason of Pargeter's having left the said employ of the defendant and his said partners was, that] Pargeter had been dishonest, and had committed divers acts of dishonesty. And the plaintiff says, that after the making of the said false, deceitful, and fraudulent representations and assertions, and

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before this suit, the plaintiff sustained great loss and damage by reason of and in consequence of the same, in this, that after the plaintiff had taken Pargeter into his said employ, and whilst the plaintiff, induced by, and relying on the said representations and assertions of the defendant, was employing Pargeter as aforesaid, Pargeter, in his said employ, and in violation of his duty therein, and before this suit, improperly and fraudulently obtained and received moneys of the plaintiff, and improperly and fraudulently appropriated and applied to his own use, certain moneys of the plaintiff, and certain moneys which he ought to have paid, but did not pay to the plaintiff, and improperly and fraudulently omitted to apply to certain purposes for and on behalf of the plaintiff, certain moneys which he ought, as such clerk, to have applied to such business purposes, and improperly and fraudulently appropriated and applied to his own use, certain moneys of clients of the plaintiff in his said business, and for which the plaintiff was responsible; and by reason of the premises, the plaintiff, before this suit, wholly lost the said moneys, and was damaged to the amount of the same.

Plea — not guilty, and issue thereon.

The cause was tried, before Maule, J., at the second sittings for London in last Easter term, when it appeared that the plaintiff, an attorney, in November, 1852, being in want of a managing clerk, Pargeter, who had been clerk in the defendant's office, applied for the situation, whereupon the plaintiff went to the defendant to inquire about Pargeter, and he put to the defendant three questions: first, for what cause Pargeter had left the defendant's service; secondly, whether he was sober; and, thirdly, whether he would be competent to conduct the plaintiff's business during the plaintiff's absence from home. In answer to the first question, the defendant said, that Pargeter had been dismissed from his service in consequence of the decrease in the common law business, owing to the changes in the law introduced by the Common Law Procedure Act; to the second, that Pargeter was sober; and to the third, that he was competent to conduct the plaintiff's common law business, but that he was deficient in his knowledge of chancery practice, and the defendant added: "I recommend you to try him." The plaintiff, relying upon what the defendant had told him, took Pargeter into his service; and the latter having been guilty of various acts of embezzlement, the plaintiff dismissed him, and brought the present action against the defendant for misrepresentation. In the course of the evidence, it appeared that Pargeter had also, while in the defendant's employment, been guilty of embezzlement, but that his offence had been overlooked, and he had been allowed to remain in the defendant's employment for some time afterwards; and that the real cause of his dismissal was that given by the defendant.

Byles, Sergt., for the plaintiff, thereupon applied to have the declaration amended by striking out the above allegations within brackets, and inserting, instead of the words "dismissed from the employment of the defendant and his said partners on account of the dishonesty of

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Pargeter," the words following, "while in the employment of the defendant and his said partners, guilty of dishonesty."

The learned judge refused to allow the amendment, and being of opinion that there was no evidence to support the declaration, directed the jury to find a verdict for the defendant.

A verdict having been found accordingly,

Byles, Sergt., obtained a rule calling on the defendant to show cause why the verdict should not be set aside, and a new trial had, or why the record and proceedings should not be amended under the Common Law Procedure Act, 1852, and a new trial had.

Watson and *Lush*, now showed cause. First, there was no evidence to go to the jury in proof of the declaration as originally framed. The true cause for the dismissal of Pargeter was that given by the defendant, and the misrepresentation alleged was, therefore, disproved; secondly, assuming that the court has the power to review the judge's decision at *Nisi Prius*, the amendment was rightfully refused. Section 222 of the Common Law Procedure Act enacts, that, "It shall be lawful for the superior courts of common law and every judge thereof, and any judge sitting at *Nisi Prius*, at all times to amend all defects and errors in any proceeding in civil causes, whether there is any thing in writing to amend by or not, and whether the defect or error be that of the party applying to amend or not; and all such amendments may be made with or without costs, and upon such terms as to the court or judge may seem fit; and all such amendments as may be necessary for the purpose of determining, in the existing suit, the real question in controversy between the parties, shall be so made." The judge is only to make such amendments as may be necessary for determining the real question in controversy. Then, by whom or by what is it to be determined what is the real question in controversy?

[MAULE, J. I should be disposed to think it is a question of fact, to be determined by the judge from the pleadings and the evidence. It may frequently happen that in consequence of imperfect instructions given to the pleader, the real question in dispute may, although well known to the parties, not be raised by the record; then, when once the existence of the real question in controversy is proved, and that it was that question which the parties came to try, the judge is to amend. The statute means that he is to enable them to raise the question, not every question that might be raised. It was not intended that if at the trial one of the parties found he could not succeed upon what was disputed, he should be enabled to dispute something else that happened to come out in the course of the evidence.]

The real question in controversy here was well raised by the record. Both parties well knew what was in dispute before the trial, and at the trial, namely, whether the defendant had fraudulently misrepresented the real cause of Pargeter's dismissal.

[JERVIS, C. J. You admit that a fraudulent misrepresentation is

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actionable, and that the real question is, was there that fraudulent misrepresentation? The plaintiff says, the defendant fraudulently suppressed the fact that Pargeter had been guilty of dishonesty, and that amounts to a fraudulent misrepresentation, and he wants to have that upon the record.]

This is not a declaration for fraudulent misrepresentation generally, but for a misrepresentation of a particular fact; and even if the amendment were made, the declaration would disclose no cause of action, and the defendant would have demurred; that is another objection to the amendment.

[JERVIS, C. J. Are you right in saying that the true test is, the effect the amendment would have on the validity of the pleading? The plaintiff might say, the declaration is good as amended, and I have a right to go to a court of error to have that question decided?]

If the allegation of Pargeter's dishonesty is inserted in the declaration, there must also be inserted the allegation that the defendant had condoned the offence, and then there clearly would be no duty on the latter to disclose an offence which he had forgiven.

[MAULE, J. It may be very questionable whether a simple suppression of what is not asked for is ground for an action. If a man comes to me and asks me whether my coachman knows the town, and whether he is competent to drive a pair of horses, am I bound not only to answer his questions but to add, if the fact is so, that the coachman is a drunken fellow?]

A full disclosure of all facts within the knowledge of the party answering, is only obligatory upon him where the basis of the contract is a full disclosure, as in policies for insuring life; but where that is not the case, a mere fraudulent suppression is not actionable. In the present case the plaintiff limited his inquiries to three; the defendant was only liable for fraudulent misrepresentation or concealment as to them. If he had been asked specifically, "Is Pargeter honest?" would he have been liable to an action for refusing to answer?

[MAULE, J. Certainly not. But the defendant said, "I recommend you to try him." If Pargeter had recently been guilty of misconduct, which would prevent any person from taking him, and the defendant knew that, would not his simple recommendation contain a concealment, for which an action might be maintained?]

It is clear, in this case, there was not such a concealment, because the defendant himself kept Pargeter in his employment for some time after the knowledge of his dishonesty.

[They then proceeded to argue, that the court had no power to review the decision of a judge who refuses an amendment at Nisi Prius; but as the court did not hear any argument on the other side, and gave no decision on the point, the argument of the plaintiff's counsel is omitted.]

Couch, in support of the rule. The defendant seeks to narrow the case too much. In order to ascertain what the substantial question between the parties was, it is necessary to consider more than the

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three specific questions put to the defendant. It is clear that the plaintiff wanted a clerk to fill an office of trust, to attend to his business during his absence, and the circumstances under which the inquiries were made of the defendant show that the plaintiff required an honest man. It was not necessary for the plaintiff to ask, in so many words, "Is Pargeter an honest man? or, has he been guilty of dishonesty?" Nor does the fact of his having asked some questions justify the defendant in suppressing the information that Pargeter had been dishonest, for substantially, the plaintiff was asking as to Pargeter's character. That being so, there was evidence to go to the jury, upon the declaration as it was originally framed, for it alleges that the defendant intended to deceive and defraud the plaintiff, and to induce him to employ Pargeter. The defendant, by saying, "I recommend you to try him," meant that he could recommend him, not merely as a person of capacity, but as trustworthy also.

[JERVIS, C. J. Assuming that what the defendant said was a warranty as to Pargeter's character, there is no charge of a fraudulent misrepresentation as to the recommendation. The foundation of the action is, that the defendant falsely misrepresented the cause of dismissal.]

[MAULE, J. The evidence was clear that the cause of dismissal was truly stated by the defendant.]

Then it is submitted, that the amendment ought to have been made. The substantial question which the parties came down to try was, whether the defendant had fraudulently suppressed what he ought to have disclosed respecting Pargeter's character, in order to induce the plaintiff to employ him.

[MAULE, J. But the declaration with the proposed amendment will not raise that question. There is no averment that the suppression was fraudulent. And whether the defendant fraudulently suppressed the fact of Pargeter's dishonesty, was not the question in controversy between the parties.]

If not of itself the real question, it was necessary for the determination of the real question. Then, lastly, the court has power to review the decision of the judge at Nisi Prius.

JERVIS, C. J. We need not hear you on that point, for as the other part of the case fails, it does not arise. I am of opinion, that on neither ground on which the rule was obtained can it be made absolute. It is contended in the first place, that enough was proved to support the declaration without the amendment. But without the allegation that the defendant fraudulently represented that he had dismissed Pargeter on account of the decrease in the business, the declaration is insufficient. The representation which it is alleged was fraudulent and false, turned out to be true; you cannot then strike that allegation out and leave only the recommendation to try Pargeter. The fraud charged in the declaration applies to the representation and not to the recommendation. Then it is said, secondly, the amendment ought to have been made; but amendments are to

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be made for the purpose of determining the real question in controversy between the parties. The question in controversy here was, whether the defendant had falsely and fraudulently represented the cause of Pargeter's dismissal—not whether he had been guilty of dishonesty, nor whether the defendant had recommended him, neither of which were disputed. If, therefore, the allegation as to the fraudulent representation of the cause of dismissal were struck out, the only thing in dispute would be struck out. I, therefore, think that the amendment was rightfully refused, and that this rule ought to be discharged.

MAULE, J. I thought, at the trial, from the pleadings, and the opening of counsel, and from the evidence, that the question in controversy between the parties was, whether the defendant had truly said that he had dismissed Pargeter on account of the decrease of business or not. If that were true, the defendant established his case; if not true, the plaintiff established his. The 3 & 4 Will. 4, c. 42, allowed amendments only in matters not material to the merits of the case, and the proposed amendment, if made at all, can only be made under the Common Law Procedure Act, and that enables the judge to make "such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties." Now, what is the real question in controversy is a matter of fact, and that matter of fact is to be decided by the judge. The framers of the Common Law Procedure Act intended to extend the powers of amendment given by the act of Will. 4, and which only applied to matters not material to the merits, and they provided for the determination of the real matter in issue in the suit; for there may be, and often are, cases where the real matter is, by some mistake or oversight, not raised by the pleadings. Now, under the new act, in such cases, that may be put upon the record which was not put on the record before, but which must be shown to the satisfaction of the judge to exist. Now, what was the controversy which existed in the present case, and which was not raised by the record? That there was a controversy as to the true cause of dismissal is clear; but there was no dispute as to whether Pargeter had been guilty of dishonesty, nor whether the fact of his having been guilty of dishonesty had been fraudulently suppressed. Certainly, neither of those two latter questions were raised by the record, but I, as a judge, did not suppose they were ever in controversy, and therefore decided that they ought not to be raised upon the record. It was not intended by the framers of the Common Law Procedure Act, that amendments should be made to raise questions never in controversy between the parties. All questions are to be excluded, and intentionally so, except those which the parties hoped and intended to try in the cause; and, as to them, amendments are to be made so as "the real question in controversy" may be determined. In the present case, there was nothing to show that the question sought to be raised by the proposed amendment was ever in controversy between the parties; on the contrary, it was

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clear that it was never intended to be raised by the record, nor ever existed in fact.

CRESSWELL, J. I am entirely of the same opinion. The question now intended to be raised was never in controversy between the parties, and whether it was or not was a matter to be determined by the judge. I think, therefore, that the amendment was rightly refused.

CROWDER, J. I think the judge was right on both points. On the declaration, as it stood without the amendment, there was nothing to go to the jury in favor of the plaintiff. On the contrary, the material allegation that the defendant had fraudulently misrepresented the cause of Pargeter's dismissal was disproved. Now, the question raised by that allegation was the only one in controversy between the parties; but an amendment is asked for, to raise the question, whether the defendant had fraudulently suppressed the fact of Pargeter having been guilty of dishonesty, that being a question which was never in controversy. The amendment, therefore, was rightly refused.

Rule discharged.

CHARLES and another v. ALTON.

June 8, 1854.

Pleading — Circuity of Action — Identity of Sum claimed — Charter-party — Freight — Negligence in insuring — Damages.

A plea is not good in avoidance of circuity of action unless it shows that the sum which the defendant is entitled to recover from the plaintiff must, in law, be the same as that for which the plaintiff sues.

By a charter-party A agreed to pay B, the master of a vessel, one third of the freight at the final sailing of the vessel, the same to be returned to A if the cargo should not be delivered at the port of destination, A insuring at the owners' expense and deducting the costs out of the first payment. A paid the one third freight, deducting the costs of insurance. The ship and cargo were lost, and A brought his action to recover back the one third freight. B pleaded that the loss of the one third freight was a loss which A was to be insured against; that A insured so negligently that the insurance was useless; and that, by such negligence, A became liable to B for the same amount which he now claimed from B and to make good the same to B:—

Held, that the plea was bad; that the conclusion of law as to A's liability was not warranted by the facts stated, as the amount to be recovered by B as damages for A's negligence was not necessarily identical with that sued for by A. *Dubitante* CROWDER, J.

THE declaration stated that on the 3d of July, 1852, it was, by charter-party, mutually agreed between the defendant, master of the good ship or vessel called The Swea, and the plaintiffs, that the vessel being tight, stanch, and strong, and every way fitted for the voyage, should, with all possible dispatch, proceed direct to Hartlepool, and

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there load from the agents of the plaintiffs a full and complete cargo of coals, which the plaintiffs bound themselves to ship, not exceeding what the ship could reasonably stow and carry over and above her tackle, apparel, provisions, and furniture, and being so loaded should therewith proceed to Point de Galle, Ceylon, or so near thereto as she might safely get, deliver, &c. That the freight should be paid at and after the rate of 26*l.* per keel of twenty-one tons four hundred-weight on the quantity delivered in full, (the act of God, the queen's enemies, fire, restraint of princes, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature or kind soever during the voyage always excepted.) That the freight should be paid, one third by bill at three months from the final sailing of the vessel from her last port in Great Britain, or in cash under discount, the same to be returned if the cargo was not delivered at the port of destination, the charterers to insure the amount at the owners' expense, and deduct the cost of doing so from the first payment of freight, and the remainder by bill at three months' date from the delivery of a certificate to the charterers, signed by the consignees, of the right and true delivery of the whole cargo, agreeably to bills of lading, less cost of coals short delivered, or in cash, under discount at 5*l.* per cent. per annum, at the charterers' option. That the vessel did proceed to Hartlepool, and there load a full and complete cargo of coals, and did therewith proceed on her voyage, and the plaintiffs paid to the defendant one third of the freight, after deducting the cost of insuring, by bill for 166*l.* 11*s.* 11*d.*, at three months from the final sailing of the vessel from her last port in Great Britain, which bill was afterwards and before action brought duly paid, and 12*l.* 19*s.* 2*d.*, by check under discount, according to the terms of the charter-party. That the cargo never was delivered at its port of destination, and although the plaintiffs have done every thing in their power to entitle them to have the amount so paid by the plaintiffs in respect of freight returned and repaid to them according to the terms of the charter-party, and although a reasonable time in that behalf has long since elapsed, yet the defendant has not returned to the plaintiffs the amount so paid in respect of freight, contrary to the terms of the charter-party. There were counts for money received by the defendant for the use of the plaintiffs, and for money paid by the plaintiffs for the defendant at his request, and for money found to be due from the defendant to the plaintiffs on accounts stated between them.

Second plea, that the cargo was not delivered at the port of destination by reason of the dangers and accidents of sea happening to the ship in the course of her voyage in the charter-party mentioned, and before the completion thereof, whereby the ship was wrecked and wholly lost during her voyage, to wit, at the Cape of Good Hope, and before her arrival at the port of destination, and the delivery of the cargo was entirely prevented, and the freight payable in respect thereof, including the part so to be returned, as in the declaration, was wholly lost, and the loss of the part of the freight to be returned was such a loss as was by the provisions of the charter-

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party to be insured against by the plaintiffs at the owners' expense, and the insurance by the charter-party required would, if the same had been effected according to the form and effect, true intent and meaning of the charter-party, have indemnified the defendant against the loss of one third of the freight which was to be returned by him in the event of the non-delivery of the cargo at the port of destination.

That although the plaintiffs charged the defendant with the cost of insuring one third of the freight, and deducted such cost from the amount of the one third of the freight so paid to the defendant, and although they could and might with the use of reasonable care and diligence have effected a good and sufficient insurance in the usual course of business, according to the true intent and meaning of the charter-party, whereby the defendant and the owners of the ship would have been fully and sufficiently indemnified against the loss of the one third of the freight so by him to be returned, yet the plaintiffs did not take or use reasonable or ordinary care and diligence in insuring such one third of the freight, and did not insure the same in the usual course of business, but improperly deviated from the usual course of business in effecting such insurance, and effected the same in such a negligent, insufficient, and improper manner, and so out of the usual course of business, and with such improper and insufficient assurers or underwriters that by and through the negligent and improper conduct of the plaintiffs in effecting such insurance and their improper deviation from the usual course of business, the insurance became of no use or value, and the defendant by reason of such improper conduct and deviation has sustained damages to the amount of one third of the freight so insured, and the plaintiffs thereby, before the commencement of this suit, became liable to the defendant for the same (being the amount in and by the first count claimed by the plaintiffs to be repaid and returned to them by the defendant) and liable to make good to the defendant such amount as he should have to return to the plaintiffs under their charter-party, and any and every sum of money paid or returned by the defendant to the plaintiffs in respect of the freight, or recovered by the plaintiffs under the first count, will be the damages sustained by the defendant by reason of such improper conduct and deviation, and the defendant will be damaged to that extent.

Ninth plea, as to the sum of 185*l.* 3*s.* 9*d.*, parcel of the plaintiffs' claim, as to the residue of the declaration, and other parcel than the sum of 89*l.* 10*s.* in the seventh plea excepted, says, that the sum of 185*l.* 3*s.* 9*d.* is the amount of one third of the freight in the first count mentioned, which was by the terms of the charter-party therein mentioned to be returned by the defendant to the plaintiffs if the cargo of the vessel therein mentioned was not delivered at the port of destination, and the sum of 185*l.* 3*s.* 9*d.* parcel, &c., is made up of the two sums of 166*l.* 11*s.* 11*d.* and 12*l.* 9*s.* 2*d.* in the first count mentioned, and the costs of insuring, in that count also mentioned, being the further sum of 5*l.* 12*s.* 8*d.*, and the sum of 185*l.* 12*s.* 9*d.* is the same sum sought to be recovered by the first count of the declaration as one third of the freight; and the defendant says that the sum of 185*l.* 3*s.*

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9*d.* is not payable by the defendant to the plaintiffs otherwise than under the terms of the charter-party in the first count mentioned, and as the one third part of the freight to be returned to the plaintiffs in case of the non-delivery of the cargo therein mentioned at the port of destination, and that the same, if recoverable at all, is recoverable under the first count; and the defendant says that the vessel in the first count mentioned was wrecked and lost, and the delivery of the cargo at the port of destination wholly prevented in the manner in the second plea mentioned, and which second plea the defendant avers to be entirely true, and the plaintiffs thereupon claimed from the defendant the sum of 185*l.* 3*s.* 9*d.*, as money received by the defendant for the use of the plaintiffs, and as money paid by the plaintiffs for the use of the defendant, at his request. That before the commencement of this suit the plaintiffs, by reason of the negligent and improper conduct in insuring as in the second plea mentioned, and their improper deviation from the usual course of business therein mentioned had become and were and still are liable to indemnify the defendant against paying or returning to the plaintiffs the sum of 185*l.* 3*s.* 9*d.*, or any part thereof, and to make good the loss sustained by such negligent and improper conduct and deviation, such loss being the sum of 185*l.* 3*s.* 9*d.* in the introductory part of this plea mentioned, and any and every sum of money payable or returnable by the defendant to the plaintiffs in respect of the freight, or recoverable by the plaintiffs under the first count will, if paid or returned to or in any way recovered by the plaintiffs be lost to the defendant, and will be the damage sustained by the reason of the negligence and improper conduct and deviation of the plaintiffs.

Demurrer to the second and ninth pleas, and joinder.

June 8. *Channell*, Serg., in support of the demurrer. These pleas are bad. They profess to set up a defence to the plaintiff's claim by way of avoiding circuitry of action, and they say that the damages incurred by the defendant on account of the plaintiffs' breach of contract are sufficiently liquidated on the face of the pleas to make the defence good. As far as the language of the pleas go, there may be an answer, but the law does not go so far as that language assumes. The cases as to the right of setting off unliquidated damages in order to avoid circuitry of action are collected in the notes to *Turner v. Davies*, 2 Wms. Saund. 149. Those which come nearest to the present case are where a breach of a contract of indemnity has been set up as an answer, as, for instance, the case of *Carr v. Stephens*, 9 B. & C. 758. There a receiver of the rents of an estate to which a married woman was entitled, having in his hands money due to her, by the direction of her husband, accepted a bill on the faith of that fund, drawn by a creditor of the husband for money lent to him. Before the bill became due, the husband and wife gave a joint direction to the receiver to pay over the money to a third person, which he did before the commencement of the action. When the bill became due, the acceptor refused to pay unless the drawer would indemnify him against the claim of the husband and wife to have the money paid according to

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their order. An indemnity was given, but the acceptor still refused to pay. The drawer having brought his action on the bill, it was held, that he could not maintain it, as the acceptor, being bound to pay the money according to the order of the husband and wife, might recover it back by suing on the agreement to indemnify. In *Cannop v. Levy*, 11 Q. B. Rep. 769, which was an action of *assumpsit* by executors for work done by the testator, the defendant pleaded that the testator, in consideration of the defendant consenting to act on a provisional committee for a projected railway, agreed to indemnify him for any charges on account of the railway, and the work was done by the testator in respect of surveying the line; that all the causes of action accrued after the promise to indemnify; that the defendant made the promises only in his character of a member of the committee; that the railway was abandoned and the work became of no value, and all sums recovered from the defendant in respect thereof would be lost to the defendant, and he would be damnified to that extent. This plea was held good for the avoiding of circuitry of action, since the defendant, upon the facts stated, was entitled to recover from the testator, or from his representatives, as much as they would recover from him.

[MAULE, J. In that case the plaintiffs' testator had entered into a contract with the defendant, which contract would be performed by the payment of money. In the present case the contract set up is a contract to insure, which would not be performed by the payment of money.]

The cases cited were cases of express indemnity, but here there neither is an express indemnity nor can any indemnity be implied. If there were any indemnity by implication, it would not have been necessary to insert the stipulation for the return of the freight. That stipulation seems to exclude the notion of such an indemnity as is relied upon by the defendant.

Rew, contra. The plea sets up a good defence within the doctrine respecting the avoidance of circuitry of action. That doctrine was spoken of by Lord Denman, in *Walmesley v. Cooper*, 11 Ad. & E. 216, in these terms: "A covenant not to sue has been held equivalent to a release on no other principle than that of avoiding circuitry of action. That is, the scandal and absurdity of allowing A to recover against B, in one action, the identical sum which B has a right to recover in another against A." The argument, on behalf of the plaintiff, seeks to narrow that doctrine, and introduces instances which do not comprehend the whole of it. The broad principle is, that when A seeks to recover from B the precise sum, which B may recover from A in another action, that constitutes a good defence. Here the defendant is entitled to recover from the plaintiffs the same sum which the plaintiffs seek to recover from him. It is said that there is no contract by the plaintiffs to indemnify, that they are not bound to make good what they recover. But it is perfectly immaterial, with regard to the circuitry of action, whether the liability of the plaintiffs arises out of a general or a particular contract, or is one which the

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law imposes. Instances are given in the notes to *Turner v. Davies*, 2 Wms. Saund. 150, which show that the doctrine is by no means confined to cases of liquidated damages. The second instance given is one where a right to sue in covenant is set up as an answer to trespass. Nor does the doctrine of set-off apply at all. That is a creature of the statute; this is a common-law right of the defendant. The plaintiffs here are in such a position, that they are bound to make good to the defendant whatever the defendant is obliged to return. The not effecting the policy puts the party, who was bound to effect it, in the position of insurer. If the measure of damages in the action by the defendant, would be the amount recovered in this action, then the plea is good.

[MAULE, J. Suppose the defendant had notice of the plaintiffs' failure to insure, and had abundant time to insure himself, would he then be entitled to recover the whole amount? If the defendant had sued before the ship was lost, then the measure of damage would have been the difference of the premium. That shows, therefore, that a person neglecting to insure, cannot always be put in the place of the insurer.]

In this particular case, the plea shows that circumstances have occurred which entitle the defendant to recover the very sum which the plaintiffs now seek to recover. In *Simpson v. Swan*, 3 Camp. 291, factors selling goods took a security payable to themselves from the purchaser, and gave their own security to the principal for the net proceeds, without disclosing the name of the purchaser. The purchaser was notoriously insolvent, and did not pay his security; and it was held, that the factors could not recover back the price of the goods from their principal. Lord Ellenborough there made use of the following language: "It would be unjust and unconscientious to throw this loss upon the defendant, if it arose from the negligence or misconduct of the plaintiffs themselves, and we have it proved that Beckwith, to whom the goods were sold, was notoriously in insolvent circumstances at the time of the sale. Upon that evidence the plaintiffs would be liable to an action for selling the goods to him; and on that ground, likewise, they cannot be permitted to recover back the money they paid upon their promissory note, which they might be compelled to repay in the shape of damages." The measure of damage, in a case of failure to insure, is the amount which might have been recovered from the underwriters. In *Sedgwick on Damages*, p. 338, the rule is thus laid down: "But it may be stated as a general rule, that in all cases of agency, whether the agent be one of private selection or *virtute officii*—whether factor or sheriff, the omission or misconduct of the agent, in regard to the matter with which he is charged or intrusted, renders him liable to the principal in damages; and, when he has been appointed to obtain or receive any given sum of money or security therefor, and it appears that he was guilty of misconduct, and that the money or security was not obtained, these two facts will, in the absence of other proof, be treated as cause and effect. The negligence will be held to be the cause of the loss, and the sum of money in question, or the security therefor, will be *prima*

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facie the measure of damages sustained by the principal." In a case mentioned in the same book, p. 340, Mr. Justice Washington is reported to have used these words: "The law is clear that if a foreign merchant, who is in the habit of insuring for his correspondent here, receives an order for making an insurance, and neglects to do so, or does so differently from his orders, or in an insufficient manner, he is answerable not for damages merely, but as if he were himself the underwriter, and he is of course entitled to the premium." Here the one amount depends upon the other, and the defendant would fail unless he showed that the amount to be recovered in the one action, was the same as that to be recovered in the other. The objection to the plea, therefore, on the ground that there was no contract to indemnify, cannot prevail. The allegation in the plea is, that the defendant suffered damage to the same amount as is claimed by the plaintiffs, and that, by reason of the plaintiffs' negligence, they became liable to pay to the defendant that amount, and to make good to the defendant such amount as he would have to return to them.

Channell, in reply. It does not appear that the sum which the defendant is entitled to claim, is identical with that which the plaintiffs claim. The allegation that the plaintiffs were liable to make good such amount as the defendant should be obliged to return to the plaintiffs, is a conclusion from the previous allegations, which they do not justify. To entitle the defendant to rely on these pleas, it is not enough that a jury would probably give him the same sum as damages, but he must show that it is a necessary conclusion of law that the sums are identical, and that a judge must so direct the jury. That proposition he has failed to establish, and, therefore, the judgment of the court should be for the plaintiffs.

JERVIS, C. J. It seems to me that our judgment must be for the plaintiffs; and I come to that conclusion because I am of opinion that the defendant has not, by his pleas, brought himself within the rule which enables a person to set up a defence in avoidance of circuitry of action. It has not been denied, and the rule is plain, as to circuitry of action, that the defendant must be in a condition to show that the sum sought to be recovered is, of necessity, the sum which he is entitled to recover back from the plaintiffs, under the same circumstances. There is no difference between the parties as to the rule itself, but only as to the application of it. I was struck by a difficulty suggested in the argument, arising from the allegation in the plea, that the defendant had suffered damage to the same amount as that claimed by reason of the plaintiffs' negligence, and that they became, before the commencement of the action, liable to pay the defendant the same amount; and further, that they became liable to make good to the defendant such amount as he should have to return to the plaintiffs. But, I think that my brother Channell has removed that difficulty by suggesting that that allegation is a conclusion drawn from the previous allegations, and that the conclusion is one which the jury would be at liberty not to draw from the facts stated. I

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think, unless the circumstances show that the judge would be bound to direct the jury that they must find the amounts to be the same, the defendant has not brought himself within the rule as to circuitry of action. This is not like the cases cited for the defendant, in which a right to payment attaches on the non-performance of a duty. This is a breach of a contract sounding in damages, an agreement to effect an insurance; and although the plaintiffs might ultimately be liable to pay the amount which they now claim, there are various circumstances which might reduce the damages to a nominal amount, or, at all events, to a much smaller one. No authority has been cited to show that in such a case as this an action is to be barred upon the principle that circuitry of action is to be avoided. One passage has been cited from a valuable work, Sedgwick on Damages, where it is said that the rule has been established in America; but I do not think the writer means, that it is an imperative rule that when an agent undertakes to insure, he becomes the insurer, and if he is guilty of negligence, he is liable to pay the amount for which the insurance should have been effected, deducting the amount of the premium. It is not said that any fixed premium is to be deducted, but it is meant that the jury may find for the amount, with that deduction, not as legal, but as reasonable damages. It is not laid down as an imperative rule of law, that such sum must be recovered; but the rule is stated as a reasonable one under the circumstances, to ascertain the amount of the loss and deduct the premium. It is not said to be a positive rule that the amounts must be identical. Now, if the jury might have given less than one third of the freight, or more than one third, as damages, the rule of law as to the avoiding circuitry of action, does not apply. I think, therefore, that the pleas are bad, and that the judgment ought to be for the plaintiffs.

MAULE, J. I am of the same opinion. In this action, the plaintiffs seek to recover a sum which on an event, which has happened, the defendant agreed to pay. The answer is, that the defendant had employed the plaintiffs to effect an insurance, and by their negligence the policy effected was useless, and by that negligence, the defendant sustained damage to the amount which the plaintiffs seek to recover. The plea goes on to say that, by reason thereof, the plaintiffs became liable to pay the amount. That allegation means that the plaintiffs are liable in point of law, and it could not be sustained by other circumstances than those mentioned in the plea; it means that the matters of fact stated in the previous part of the plea, imposed this liability on the plaintiffs. The cases decided in late years show that such an allegation of liability will not make a pleading good which would be bad without it. The plea, therefore, is to be considered without the allegation as to liability, and it amounts to this: that the plaintiffs have been guilty of negligence, and thereby the defendant has sustained damage to the amount which the plaintiffs seek to recover; and it is said that the plea is good, because it falls within the principle as to circuitry of action, and that a state of things exists which gives the defendant a right of action for the same

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amount. If the plaintiffs are bound to pay the defendant the same sum in another action which they are now seeking to recover from him in this, the plea is good. The plea charges the plaintiffs with negligently performing the duty which they had taken upon themselves, of effecting a policy; and the allegation relied upon as to the identity of the amount is: "that the defendant has sustained damage to the amount of the one third of the freight so insured." Now, such an allegation as that, is one of fact. It means, that, in consequence of the improper conduct of the plaintiffs, the defendant has sustained damage, and that the damage amounts to the sum claimed by the plaintiffs. I do not think that sufficiently identifies the subjects of the declaration and the plea. The action for the breach of duty complained of in the plea, is one which would arise as soon as the negligence took place; and subsequent matters, though they showed the loss might possibly be to the amount which afterwards happened, did not, by any means, determine the necessary amount of damages in point of law. The action, as soon as the cause of action arose, would have been for the damages which had accrued. A jury before the loss, might have given exactly the same damages as after, and after as before. The question is, what damages the plaintiff had sustained at the time when the right of action vested in him? The jury might have considered, supposing the policy could have been effected at the time when the action accrued, for how much the policy might have been effected. If the policy could have been effected then, they might find for the whole amount agreed to be insured, but they were not bound to do so. If the plaintiffs in that action could have shown that the negligence might produce the whole loss, that would not have been binding on the jury. That was a matter, like any other piece of evidence, fit to be taken into their consideration. It is not at all conclusive thereby that the sum of money which would have been secured, is the same that ought to be paid. When the loss has happened, it is very proper that it should be considered by the jury; but that is all. The circumstances under which it has arisen, are to be considered by them in determining the amount of damages to be awarded. Perhaps, after the loss, they would be bound not to give more than the amount of the actual loss, when no greater loss could happen. Before the loss, they might give more; in any case, we cannot treat the amount as liquidated, and, therefore, the allegation that the plaintiffs became liable to the defendant for the same amount as they now claim, does not bring the case within the principle as to circuity of action, because the plea does not show the sum which the plaintiffs claim to be the same as the defendant is entitled to recover from them.

CRESSWELL, J. I am entirely of the same opinion, and for the reasons so fully stated by my brother Maule. There is no identification of the sum claimed in the declaration, and the damages which the defendant says in his plea he is entitled to recover from the plaintiffs. I quite agree that a jury would not be bound to give the defendant the sum now claimed by the plaintiffs, therefore the defendant is

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not entitled to set up the defence as being in avoidance of circuitry of action.

CROWDER, J. I own I have entertained, and still do entertain, doubts in this case; and it would be with considerable reluctance that I should arrive at the conclusion that the defence is bad. I think the rule, with regard to avoiding circuitry of action, is a very valuable one; and if a case can be brought within the authorities or the principle, I think it very desirable that it should. In point of fact, there is no doubt, if the plaintiffs recover the one third of the freight and the defendant brings his action, and states in the declaration what he has here stated in his plea, the jury would give him the same amount. The passages quoted from *Sedgwick*, are very strong, and especially the language of Mr. Justice Washington, (p. 340, cited above.) But it is not distinctly laid down as a positive rule of law, that the principal is entitled to the amount of the loss. If there had been a contract to indemnify, there would have been no doubt; but this was a contract to insure, and there is no direct authority in such a case. I have great reluctance and considerable doubt, in coming to the conclusion that the judgment should be for the plaintiffs.

Judgment for the plaintiffs.

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June 7, 1854.

Judgment recovered in Trover, when a Bar to Money had and received — Practice — Amendment.

Judgment recovered (though without satisfaction) against one, in an action for a conversion of goods by wrongfully selling, is a bar to an action for money had and received, against another, for the proceeds of the same sale, whether he be a party to the conversion or a stranger.

Where a pleading is amended at Nisi Prius, any formal defects in other parts of the pleading, rendered necessary by the amendment, must be taken as amended also.

Declaration for money had and received, with a count in trover. Plea, that the debt became due from the defendant jointly with B, who had also jointly converted the plaintiff's goods, and that judgment had been recovered by the plaintiff against B for the same causes of action. At the trial, the count in trover was given up, and it was proved that the defendant, assisted by B, had wrongfully sold, as auctioneer, the goods in question, and that the plaintiff had recovered judgment against B, without satisfaction, for the conversion, but that the proceeds of the sale (for which this action was brought) were received by the defendant alone. The plea was then amended by striking out the allegation of the joint receipt, and substituting, that the action was for the proceeds of the sale of the goods for the conversion of which the plaintiff had recovered judgment against B: —

Held, that the amendment was right, and should be made without costs, as the plea, both

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before and after amendment, raised substantially the same defence, namely, the recovery against B : —

Held also, that this was a valid defence.

Semble, per Jervis, C.J., that a recovery in trover for the conversion of goods vests the property in the goods in the defendant by relation from the time of the conversion.

THE declaration was for money had and received, goods sold and delivered, and for money due upon an account stated; and also for that the defendant converted to his own use and wrongfully deprived the plaintiff of the use and possession of the plaintiff's goods.

Pleas — First, never indebted. Secondly, to the last count, not guilty. Thirdly, to the same, that the goods were not the property of the plaintiff. Fourthly, as to the money received to the plaintiff's use and the goods converted, [that the said debt for money received became due from, and was contracted by, the defendant jointly with Thomas Barber Johnson, and not by the defendant alone, nor by the two jointly and severally, but only jointly;] and that the grievances in the last count mentioned, so far as they relate to the said goods, were committed by the defendant and the said Thomas Barber Johnson, jointly, and not by the defendant alone; which Thomas Barber Johnson, at and from the time of the accruing of the causes of action to which this plea is pleaded, until and at the time of the recovery of the judgment hereinafter mentioned, was with the defendant jointly liable to the plaintiff for the said causes of action.

And the defendant further says, that, after the accruing of the causes of action to which this plea is pleaded, and before this action, the now plaintiff commenced, in the Court of Common Pleas, at Westminster, an action against the said Thomas Barber Johnson, and by his declaration in that action the now plaintiff declared and said, amongst other things, that he sued the said Thomas Barber Johnson, for money payable by the said Thomas Barber Johnson to the plaintiff, for money received by the said Thomas Barber Johnson to the plaintiff's use, and for that the said Thomas Barber Johnson converted to his own use and wrongfully deprived the plaintiff of the use and possession of the plaintiff's goods, (that is to say,) &c., and the plaintiff, by his said declaration in that action, claimed 500/., and such proceedings were thereupon had in the said court in that action that afterwards, and before this action, the plaintiff recovered against the said Thomas Barber Johnson, for and in respect of, amongst other things, his said claim for money payable to him by the said Thomas Barber Johnson, and for the said conversion to the said Thomas Barber Johnson's own use and the said wrongful deprivation of the plaintiff of the use and possession of the said goods by the said Thomas Barber Johnson, the sum of 100/ with 136/ for costs of suit; and the defendant says that the said goods in the declaration in the said other action mentioned as aforesaid were and are the same identical goods as the said goods which in the declaration in this action are described as, &c., and that the conversion and deprivation thereof, whereof the plaintiff in the said other action complained as aforesaid, was and is the same as the conversion and

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deprivation thereof, whereof in this action he has in his declaration complained, and to which this plea is pleaded, and that the said claim in the said other action, in respect of money payable for money received, included the plaintiff's said claim in this action for money payable for money received, and to which this plea is pleaded, and that the causes of action whereof the plaintiff, in his declaration in the other action, so complained as aforesaid, and for and in respect of which, amongst other things, he so as aforesaid recovered the said judgment, included all the causes of action to which this plea is pleaded, which judgment remains on record in the said court. The plaintiff replied, taking issue on the first three pleas, and to the fourth, *nul tiel record*.

The cause was tried, before Williams, J. at the sittings for Middlesex, in last Trinity term, when it appeared that the plaintiff claimed the goods in question, under a bill of sale from one Midgley, and that Midgley had executed a subsequent bill of sale of the same goods to one Perkins, who had delivered them to the defendant, who was an auctioneer, to be sold. The Thomas Barber Johnson mentioned in the plea, was the defendant's son, and assisted him in his business, and, at the auction, the goods were actually sold by the latter, although the defendant, both before and after the sale, acted as auctioneer as to goods, the property of other persons, sold at the same auction. The goods in question were sold for 148*l.* 15*s.*, and the defendant received the whole amount. In the former action against the son alone, the plaintiff had recovered 100*l.* for this sale and conversion, having confined his claim to the count in trover. On behalf of the defendant, it was contended that the fourth plea was proved in substance. The plaintiff, who confined his claim to the count for money had and received, contended that the plea was not proved, inasmuch as the proceeds of the sale had been received by the defendant alone, and not by the defendant and his son jointly. The learned judge being of opinion that the plea was not proved, the plaintiff applied to have it amended by striking out the words between brackets, and inserting instead "that the money was money received for and as being the proceeds of the sale of the goods in the last count and herein mentioned." The fourth plea having been amended accordingly, the verdict thereon was entered for the defendant, and leave was given to the plaintiff to move to enter the verdict for him for 148*l.* 15*s.*, if the court should be of opinion that the plea was no defence; and if they should be of opinion that the amendment was right, they were to say on what terms it ought to have been made.

Byles, Sergt., having obtained a rule *nisi* accordingly,

Lush now showed cause. The amendment was rightly allowed, and the "real matter in controversy between the parties" was not altered by it, nor was any new matter raised by it. The conversion was the sale, and for that the defendant and his son were jointly liable, the former as principal, the latter as his agent; and the money

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being the proceeds of the joint conversion, the receipt by one was a receipt by the two. If so, the original plea was proved in substance, and, as amended, it was proved literally. Then, secondly, does the amendment, as the plaintiff contends, vitiate the plea? The plaintiff having a right of action in trover may waive the tort, and sue for money had and received; and if he recover, the judgment in the action for money had and received may be pleaded as a bar to a subsequent action of trover; and, *vice versa*, if he sue in trover, a recovery in trover is a bar to a subsequent action for money had and received. Also, where there are two joint wrongdoers, judgment recovered against one may be pleaded as a defence by the other. *Brown v. Wootton*, Cro. Jac. 73, and *Hitchin v. Campbell*, 3 Wils. 304. The test laid down in the latter case was, whether the same evidence would support both actions.

[MAULE, J. Do you contend that there was an estoppel?]

No; but that there has been satisfaction, on the principle laid down by Parke, B., in *King v. Hoare*, 13 Mee. & W. 494. Then, if the plea is good, the amendment was properly made, and the defendant ought not to pay the costs of the day.

[JERVIS, C. J. I think that substantially the same defence is raised by the amended as by the original plea.]

Hawkins and *Finlason*, in support of the rule. The amendment ought not to have been allowed, or if allowed, it ought only to have been on payment of the costs of the day. The substance of the plea as originally framed was the joint receipt, and upon the issue as to that, the plaintiff would have succeeded; it is hard, therefore, that he should pay the costs of the day in consequence of the amendment. But the plea, as amended, is bad in form; it does not allege that the money had and received was the proceeds of the conversion sued for in the former action.

[JERVIS, C. J. That objection ought to have been made at the trial, and it would have been cured by further amendment.]

Then, as to the substantial question, the amended plea is bad. The right of action for the conversion of the goods is distinct from the right of action for the wrongful receipt of the money; and the forms and rights of action being different, a judgment recovered in one is no bar to a recovery in another. *Ferrers v. Arden*, Cro. Eliz. 667; *Lacon v. Barnard*, Cro. Car. 35; *Put v. Rawsterne*, T. Raym. 472.

JERVIS, C. J. A right of action for money had and received, may be distinct from a right of action for conversion of goods; but here the conversion was by sale of the goods, and the money had and received was the proceeds of the sale, and the plaintiff has recovered the full value in an action for the conversion.]

In the former action the plaintiff only recovered 100*l.* for the conversion, but the goods were sold for 148*l.* 15*s.* The plaintiff is at least entitled to recover the difference in the present action.

[JERVIS, C. J. *Adams v. Broughton*, 2 Str. 1078, seems to show that the recovery in the former action, without payment, changed the property in the goods. If so, the present defendant received the

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money not of the plaintiff, but of Thomas Barber Johnson, for they were the goods of the latter, and not of the plaintiff.]

Judgment in trover, without satisfaction of the damages, did not pass the property in the goods. *Cooper v. Shepherd*, 3 Com. B. Rep. 266. It would have been impossible to recover for the present demand in the former action. *Hitchin v. Campbell* shows that a judgment recovered in trover is no bar to an action for money had and received to recover the value of the same goods.

[CRESSWELL, J. In that case the verdict was for the defendant, on the plea of not guilty in the action of trover, because possibly the defendant had the plaintiff's authority to sell; but that would not prevent his being liable to the plaintiff for the proceeds of the sale, in an action for money had and received.]

JERVIS, C. J. I am of opinion that this rule should be discharged, and that the plea was rightly amended, and as amended was substantially proved. The objections now made by Mr. Hawkins to the amended plea, if, indeed, they are worth any thing, ought to have been made at the trial, and they would have been obviated by the further necessary amendment. There is no question but that the plea was proved, and I think there can be as little that my brother Williams was right in allowing the amendment; for the question substantially at issue between the parties, and what they came down to try was, not whether the proceeds of the sale of the plaintiff's goods had been received by the defendant and his son jointly, but whether there had been such a substantial recovery, in the former action against the son, as would bar the present action. Whether or not the two had received the money, was a mere technical point, as the plaintiff well knew when he went to trial; and since the real question in controversy was raised by the amendment, I do not think that it ought to be made on payment of costs of the day by the defendant. If the plaintiff had been really misled by the defect in the pleadings, or came down only to try the question whether there had been a joint receipt, and immediately upon the amendment being made had withdrawn from the trial, he might have had some claim to the costs of the day.

The main question now is, whether the plea is a good answer to this action, and I think that it is. The authorities show, and it is admitted on all hands, that if Johnson, the son, had received the money, and the plaintiff had sued him for the conversion, and had recovered judgment without fruits, the judgment would have been a bar to a second action against him, for money had and received. On the same principle, I think, if he and the present defendant jointly converted the goods, but the defendant only received the proceeds of the conversion, the plaintiff cannot recover from him, as money had and received, the proceeds of that conversion, if he has already recovered from the son the value of the goods in an action for the conversion. Mr. Finlason admits, that if the defendant had only received the 100*l.* as the value of the goods, as the plaintiff had recovered that sum in the former action against the son, he could not recover it

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again against the defendant; but he says, that as the defendant received 150*l.*, the plaintiff is entitled to recover the difference, and that the plea ought only to have been pleaded in bar of 100*l.*, and in support of this view, *Hitchin v. Campbell* was cited. That was an action for money had and received, against A, to refund the proceeds of the sale of the plaintiff's goods. Plea, a former action of trover against A, and B treating the sale as the conversion, and on not guilty pleaded verdict and judgment for the defendants. To this there was a general demurrer, and judgment was given for the defendants. Now, as the verdict in the action of trover might have gone, as my brother Cresswell has pointed out, on the express ground that the defendants had the plaintiff's authority to sell, which would be a good defence to an action of trover, but none whatever to an action for money had and received, it is obvious that the case is no authority on the present question. The fallacy in the plaintiff's argument arises from forgetting, that by the judgment in the action of trover the property in the goods was changed from the date of the conversion, and that they then became the goods of the son, and that, when the father received the proceeds of the sale, he received the proceeds of the sale of the son's goods. It is said there are authorities to show that the property is changed only from the time of the receipt of the damages in the action of trover, and a passage is cited in *Cooper v. Shepherd*, from Jenkins, 4 Cent. Cas. 88, where it is said that, in trespass, the property is not changed till the receipt of the damages. But, in *Adams v. Broughton*, it is laid down that the judgment, and not the payment of the money recovered, changes the property, and the true ground is stated, by my brother Parke, in *King v. Hoare*, namely, that that which is uncertain is made certain by the judgment, and then the judgment affords a higher remedy, and the right of action for trover is merged in it.

MAULE, J. I also think that this rule should be discharged, and that this was a fit case for an amendment. There was a variance between the facts pleaded and the facts proved, but not one that bore at all upon the real question in controversy between the parties, which was, whether the plaintiff had already recovered against one of the parties to the conversion in such a way as precluded him from suing the other. That question was raised by the original plea, and it is also raised by the amended plea, and was not affected by the amendment. There is no reason for imposing upon the defendant the condition of paying the costs of the day, for the plaintiff ought not to go down to trial relying on trivial objections such as were obviated by the amendment, and he must expect that all necessary amendments will be made at the trial to rectify such unimportant variances; that I take to be the sense and spirit of the Common Law Procedure Act. Then, as to the amended plea, it appears to me to furnish a substantial answer to the action. It says, that the money sought to be recovered, was the proceeds of the sale of the plaintiff's goods, sold by the defendant and his son, and that the plaintiff had recovered, in a former action of trover against the son, the full value of the goods.

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In an action of trover the plaintiff may not always (certainly not always in an action of trespass) recover the full value of his goods. What might be the result if it were shown here, which it is not, that the plaintiff had not recovered the full value in the former action, I say nothing; but, in the present case, we must take it that the plaintiff, having his election either to sue in trover for a conversion, or in an action for money had and received, elected to sue in trover, and recovered the full value from the son. The plaintiff was entitled to that election, and to no more; and the fact of the proceeds of the sale being more than the sum he recovered in the action of trover, makes no difference: having made his election, he is barred as to the whole proceeds of the sale. It was contended that he was, at all events, entitled to recover the difference between the amount given by the jury in the action of trover, and the actual proceeds of the sale. But, as I have already said, he was at liberty either to recover the value of his goods, at the time of the conversion, as found by the jury in an action of trover, or to recover, in an action for money had and received, the proceeds of the sale. He has made his election, and must be bound by it. It is said, also, that the present defendant was a stranger to the sale. I do not think upon the evidence that he was; but if he were ever so much a stranger, if the plaintiff has already recovered full compensation, or what the law considers full compensation, from the son, he cannot recover the same thing again in any form of action from anybody.

CRESSWELL, J. I am of the same opinion on both points, for the reasons already given by the court. As to the plaintiff's claim to recover the difference, he was entitled to his election — either to treat the sale as a wrongful act, and to recover the value of the goods at the time of the conversion in an action of trover, or to treat the sale as a sale by his authority, and sue for the proceeds in an action for money had and received. Having made his election, he is bound by it; and having sued in trover and got judgment, he cannot now sue for money had and received.

CROWDER, J., concurred.

*Rule discharged.*¹

¹ The doctrine of *Brown v. Wootton*, as affirmed in the foregoing case, has been sometimes adopted in America, in its entire extent, and perhaps in no case more pointedly than in *White v. Philbrick*, 5 Greenleaf, 145, decided in 1827.

It was there expressly adjudged that a judgment in trover without satisfaction, if execution be sued out thereon, is a bar to an action of trespass afterwards brought by the same plaintiff against another defendant. And this proceeds entirely upon the ground that the judgment *itself* in the

first action vests the property in the defendant. And some other cases recognize and approve this principle. See *Carlisle v. Burley*, 3 Greenl. 251; *Rogers v. Moore*, 1 Rice, 60; *Morrell v. Johnson*, 1 Hen. & Munf. 449; *Floyd v. Brown*, 1 Rawle, 121; *Marsh v. Pier*, 4 Rawle, 273; *Fox v. The Northern Liberties*, 3 Watts & S. 107; *Campbell v. Phelps*, 1 Pick. 62, Parker, C. J.

But it is difficult to see how this can be so; for if such be the effect of the judgment alone, without satisfaction, the credi-

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November 5, 1853.

New Trial — Insufficiency of Damages.

The court refused to grant a rule for a new trial, on the ground of the insufficiency of the damages, where the jury had given only one farthing damages in an action of trespass for taking the plaintiff before a magistrate, upon an unfounded charge of felony, merely because a question of character was involved.

THIS was an action of trespass and false imprisonment, tried before Cresswell, J., at the last assizes for Kent. The only plea was, not guilty.

The trespass complained of consisted in the defendant's taking the plaintiff into custody upon an unfounded charge of having stolen a ferret, and carrying him before a magistrate, by whom he was fined.

The jury having found a verdict for the plaintiff, with one farthing damages, and the learned judge having refused to certify, under the 2 & 3 Vict. c. 24, s. 2, to enable the plaintiff to obtain costs,

Horn, moved for a new trial, on the ground of the insufficiency of

tors of the wrongdoer might attach the property as his, immediately after the recovery of the judgment against him, and thus take the property from the former owner without any compensation, and at the same time, take from the wrongdoer the very means by which he might satisfy the first plaintiff's judgment. The argument for this doctrine is mainly this. That if A has a right of action in tort against B and C, separately, for the same goods, and elects to proceed against B alone, and obtains judgment against him, he thus, by his judgment merges his original cause of action, and obtains a higher security and renders his damages certain which were before unliquidated, and by his judgment obtains a right of execution against the property and body of the defendant, which is the highest civil remedy known to the law. But this argument would apply with equal force to actions of *contract*; and yet, it has never been held that a judgment against one of two joint and separate contractors without satisfaction is a bar to an action against the other.

The current of American authorities is

entirely opposed to the decision of *Brown v. Wootton*. See *Sanderson v. Caldwell*, 2 Aikens, 195; *Shelden v. Kibbe*, 3 Conn. 214; *Osterhout v. Roberts*, 8 Cowen, 43; *Livingston v. Bishop*, 1 Johns. 290; *Curtis v. Groat*, 6 Johns. 168; *Sharp v. Gray*, 5 B. Monroe, 4; *Jones v. McNeil*, 2 Bailey, 466; *Elliot v. Porter*, 5 Dana, 299; *Blann v. Crocheron*, 20 Alabama, 320; *Williams v. Oley*, 8 Humphreys, 563; *Hyde v. Noble*, 13 New Hamp. 494.

There may be good reason to hold that a judgment in trover, would be a bar to a subsequent action of trespass or *assumpsit* for the same goods against the same defendant, but this would be on the ground of estoppel. But we can see no sufficient reason why a judgment for the plaintiff against one of two co-trespassers, should be conclusive against him when proceeding against the other, any more than should a judgment for the defendant in the first suit be a bar to a subsequent action against the other co-trespasser for the same goods. But this is clearly otherwise. *Sprague v. Waite*, 19 Pick. 455.

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the damages. He referred to *Page v. Carter*,¹ where a rule was made absolute for a new trial in an action of *crim. con.*, on the ground that the verdict was against evidence, though the damages were under 20*l.*, because it involved a question of character.

MAULE, J. In the absence of any special circumstances, we cannot interfere with the functions of the jury. It was for them to say what damage the plaintiff had sustained; and we have no means of knowing that their estimate was an improper one.

The rest of the court concurring,

Rule refused.

TUPPER, appellant, v. NEWTON, respondent.

November 11, 1853

Local Paving Act — Qualification of Commissioners — Penalty.

A local paving act enacted that no person should be capable of acting as a commissioner under it, unless rated as an occupier of lands, &c., within the town, and possessed of a certain amount of property, or until he had taken and subscribed a certain oath. In an action against one for acting as a commissioner under the act "when he was not duly qualified," the defendant proved that he was rated and was possessed of the requisite property qualification, but did not prove that he had taken and subscribed the oath required by the act:—

Held, that he was not bound to prove the oath.

THIS was an action brought in the county court of Kent, holden at Canterbury, under the 3 & 4 Will. 4, c. 105: "An act for paving, cleansing, lighting, watching, repairing, and improving a certain portion of the parish of Herne, in the county of Kent," to recover a penalty of 50*l.* from the defendant, for having on the 2d of May last acted as a commissioner in execution of the said act, when he was not duly qualified.

The action was tried before the county court on the 13th of July last, when the jury found a verdict for the defendant.

On the trial, the plaintiff proved that the defendant had acted as a commissioner in the execution of the said act, on the 2d of May, 1853; and the defendant proved that he was a rate-payer of Herne Bay (?), and possessed freehold property in his own right, exceeding the value of 50*l.* per annum.

It was admitted that the defendant had not become disqualified by any of the clauses of disqualification mentioned in the 4th section of the act.

¹ Not reported.

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The plaintiff's attorney required proof to be given that the defendant had taken and subscribed the oath mentioned and directed by the 8th section.

This evidence was not given; and the judge held that it was not necessary, for, that the 11th section of the act referred to created four several offences with a penalty of 50*l.* attached to each; and that, in the form of action which the plaintiff had brought, it was not necessary for the defendant to give any other evidence than that of his being a rate-payer of Herne Bay, and possessing sufficient property to qualify him; and, as the defendant proved, that, at the time of his acting as aforesaid, he held freehold property in his own right exceeding the value of 50*l.* per annum, and he had not been brought within any of the disqualification clauses mentioned in the 10th section of the said act, he directed the jury to find a verdict for the defendant, and which they accordingly did.

The question for the opinion of the court, is, whether the direction of the judge was correct.

Channell, Sergt., for the appellant. The question in this case turns upon the construction of certain clauses of the Herne Paving Act, 3 & 4 Will. 4, c. 105. The 3d section appoints twenty-four persons named to be commissioners for carrying the act into execution. The 5th section provides for their going out of office by ballot; and the 4th section, for the election of their successors, at a public meeting, by the occupiers of lands, tenements, or hereditaments, within the said town. The 8th section provides "that no person (except the persons nominated and appointed in and by this act) shall be capable of acting as a commissioner in the execution of this act, unless he shall be rated as an occupier of lands, tenements, or hereditaments within the said town, and shall really and *bonâ fide*, in his own right, or in the right of his wife, be seised or possessed of real estate of the clear yearly value of 50*l.*, or be the tenant or occupier of lands, tenements, or hereditaments within the said town, of the clear annual value of 50*l.*; nor shall any person be capable of acting as a commissioner in the execution of this act, (except in administering the oath hereinafter mentioned,) until he shall have taken and subscribed before one or more of the said commissioners, (who is and are hereby empowered to administer the same,) an oath, in the words or to the effect following, that is to say, 'I, ———, do swear, that I will faithfully and impartially, according to the best of my skill and judgment, execute and perform all and every the powers and authorities vested and reposed in me as a commissioner by virtue of an act passed in the third year of the reign of his Majesty King William the Fourth, intituled, &c., so help me God:' and an entry or memorandum shall be made in the book of proceedings of the commissioners, of the taking and subscribing of such oath, and of the date of administering the same." The 9th section enacts "that every person, being an inhabitant householder within the said town, and being seised in fee-simple in possession of a messuage, land, ground, or hereditaments within the said town, of the annual value of 50*l.* or upwards, clear of all taxes what-

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soever in respect thereof, shall and may act and be a commissioner under this act: Provided, nevertheless, that every such person shall, previous to his acting as such commissioner, deliver to the clerk of the said commissioners, at some meeting of the said commissioners, a schedule or inventory in writing, describing the situation, and the occupier or tenant of such messuage, land, ground, or hereditaments, previously verified on oath before some justice of the peace acting for the county of Kent, and shall also take and subscribe, before one or more of the said commissioners, the oath hereinbefore directed to be taken by the said commissioners; and the clerk to the said commissioners for the time being is hereby required to enter forthwith such schedule or inventory in a book to be provided for that purpose by the said commissioners." The 10th section enumerates various grounds of disqualification, such as, becoming bankrupt or insolvent, or interested in a contract, &c. And the 11th section enacts, "that, if any person not being qualified as aforesaid, or having ceased to be qualified according to the directions of this act, or not having taken and subscribed the oath hereinbefore mentioned, or being disqualified by any of the causes aforesaid, shall act as a commissioner in the execution of this act, every such person shall, for every such offence, forfeit and pay the sum of 50*l.* to any person who shall sue for the same," &c. The question is, whether the defendant did enough when he proved that he possessed property of the required value, and was an inhabitant rate-payer, or whether he was not bound further to prove that he had duly taken and subscribed the oath prescribed by section 8. The statute clearly meant to apply to something more than property qualification.

Hayes, contra, was not called upon.

JERVIS, C. J. I am of opinion that the direction of the judge of the county court was quite right. The charge against the defendant, is, that he acted as a commissioner under the Herne Paving and Lighting Act, 3 & 4 Will. 4, c. 105, when he was not duly qualified. The evidence was, that the defendant was in all respects duly qualified, but there was no proof of the formal qualification by taking and subscribing the oath. I think the judge was quite right in holding such proof to be unnecessary, and consequently that the appeal should be dismissed with costs.

The rest of the court concurring,

Appeal dismissed, with costs.

General Steam Navigation Co. v. Mann:

THE GENERAL STEAM NAVIGATION COMPANY v. MANN.

November 4, 1853.

Shipping — Admiralty Regulations as to Lights to be exhibited by Steam-Vessels — Collision.

By the admiralty sailing regulations, made pursuant to the 14 & 15 Vict. c. 79, steam-vessels are required to exhibit lights in particular positions; and the 27th section of the statute directs, that when any vessel proceeding in one direction meets a vessel proceeding in another direction, and the master perceives that, if both continue their respective courses, they will pass so near as to involve risk of a collision, he shall put his helm to port. In an action by the owners of a steam-vessel which had shown the proper lights, for a collision:—

Held, that it was for the jury to say whether or not the master of the other vessel had disobeyed the directions of the statute; and that it did not rest upon the master's opinion as to the probability of a collision.

THE 26th section of the 14 & 15 Vict. c. 79, "with respect to the lights to be carried, and other provision to be made for guarding against accidents from collision," enacts that "the Lord High Admiral, or the commissioners for executing the office of Lord High Admiral, shall from time to time make regulations requiring the exhibition of such lights by such classes of vessels, whether steam or sailing vessels, within such places, and under such circumstances as they think fit, and may from time to time revoke, alter, or vary the same; and they shall cause such regulations to be published in the London Gazette, and to be otherwise publicly made known; and such regulations shall come into operation on a day to be named in such Gazette; and they shall cause such regulations to be printed, and shall furnish a copy thereof to any owner or master of a vessel who applies for the same; and production of the Gazette containing such regulations shall be sufficient evidence of the purport and due making thereof; and all owners and masters or persons having charge of vessels shall be bound to take notice of the same, and shall, so long as the same continue in force, exhibit such lights, and no others, at such times, within such places, in such manner, and under such circumstances, as are enjoined by such regulations; and, in case of default, the master or other person having charge of any vessel, or the owner of such vessel, if it appear that he was in fault, shall, for each and every occasion when such regulations are infringed, forfeit and pay a sum not exceeding 20*l*.: Provided always that all regulations made by the said Lord High Admiral, or commissioners for executing the office of Lord High Admiral, under the authority of the said recited acts, 9 & 10 Vict. c. 100, and 11 & 12 Vict. c. 81, or either of them, and in force at the passing of this act, together with the penalties applicable thereto, shall continue and be in force as if the same had been made under this act, until the same be revoked."

And section 27 enacts, that, whenever any vessel proceeding in one direction meets a vessel proceeding in another direction, and the mas-

ter or other person having charge of either such vessel perceives that, if both vessels continue their respective courses, they will pass so near as to involve any risk of a collision, he shall put the helm of his vessel to port, so as to pass on the port side of the other vessels, due regard being had to the tide and to the position of each vessel with respect to the dangers of the channel, and, as regards sailing vessels, to the keeping of each vessel under command; and the master of any steam-vessel navigating any river or narrow channel, shall keep, as far as is practicable, to that side of the fairway or mid-channel thereof which lies on the starboard side of such vessel; and, if the master or other person having charge of any steam-vessel neglect to observe these regulations, or either of them, he shall for every such offence be liable to a penalty not exceeding 50*l*."

The power given by the above statute to the commissioners of the admiralty was exercised by an order, bearing date the 1st of May, 1852, which came into force on the 1st of August in that year, and which made the following provision as to lights:—

"Steam-vessels. All British sea-going steam-vessels, (whether propelled by paddles or screws,) shall, within all seas, gulfs, channels, straits, bays, creeks, roads, roadsteads, harbors, havens, ports, and rivers, and under all circumstances, between sunset and sunrise, exhibit lights of such description, and in such manner, as hereinafter mentioned, namely:—

"When under steam, a bright light at the foremast head, a green light on the starboard side, and a red light on the port side.

"1. The masthead light is to be visible at a distance of at least five miles in a dark night, with a clear atmosphere; and the lantern is to be so constructed as to show an uniform and unbroken light over an arc of the horizon of twenty points of the compass, being ten points on each side of the ship, namely, from right ahead to two points abaft the beam on either side.

"2. The green light on the starboard side is to be visible at a distance of at least two miles in a dark night, with a clear atmosphere; and the lantern is to be so constructed as to show a uniform and unbroken light over an arc of the horizon of ten points of the compass, namely, from right ahead to two points abaft the beam on the starboard side.

"3. The red light on the port side is likewise to be fitted so as to throw its light the same distance on that side.

"4. The side lights are, moreover, to be fitted with screens on the inboard side, of at least three feet long, to prevent the lights from being seen across the bow.

"When at anchor — A common bright light.

"Sailing vessels. We hereby require that all sailing vessels, when under sail, or being towed, approaching or being approached by any other vessel, shall be bound to show, between sunset and sunrise, a bright light in such a position as can be best seen by such vessel or vessels, and in sufficient time to avoid collision.

"All sailing vessels at anchor in roadsteads or fairways shall be also bound to exhibit, between sunset and sunrise, a constant bright

light at the masthead, except within harbors or other places where regulations for other lights for ships are legally established.

"The lantern to be used when at anchor, both by steam-vessels and sailing vessels, is to be so constructed as to show a clear good light all round the horizon."

The General Steam Navigation Company brought an action against the defendant to recover damages in respect of a collision between their steam-vessel, *The Clarence*, trading between London and Leith, and a sailing vessel called *The Maria*, belonging to the defendant, which took place on Sunday evening, the 6th of March, 1853.

The cause was tried before Pollock, C. B., at the last Summer Assizes, at Croydon. The undisputed facts were as follows: The defendant's vessel, *The Maria*, was on the evening in question, the time being about half-past six, and it being very dark, proceeding towards the north, and the plaintiff's vessel, *The Clarence*, coming from Scotland to London; *The Maria* keeping in shore, which was her proper course, and *The Clarence* outside.

The witnesses on behalf of the plaintiffs — the captain, the second mate, three seamen, and a passenger, — stated, in substance, that *The Clarence* was proceeding on her course, with the proper lights exhibited at the masthead and on each paddle-box; that they first perceived *The Maria* when about six ships' lengths off, coming towards them, a little to the port side; that *The Clarence* immediately ported her helm, and the people on board the other vessel were hailed and desired to do the same; and that *The Maria* coming stem on struck *The Clarence* abreast of her mainmast, doing her considerable damage.

The defendant's witnesses, — the master, the mate, and four seamen of *The Maria*, — stated, that, just before the happening of the accident, *The Maria* was keeping her course in shore, close hauled; that a vessel was seen about two miles off, showing three lights, namely, a bright light at the masthead, a green light on the starboard, and a red light on the port side; that, shortly afterwards, the light at the masthead and the green light only were visible, which would indicate that she was on their starboard side; that this state of things continued for several minutes, (from six to ten,) when both the red and the green light again became visible; and that then *The Maria* immediately ported her helm.

The learned judge, in summing up, told the jury, that, if the collision was the result of mere accident, owing to the darkness of the night, or if there was negligence on both sides, the plaintiffs were not entitled to recover. And, after observing upon the evidence, his lordship continued: It appears to me to be a very unsafe thing to see a vessel right a-head ten minutes, and not to steer as the act of parliament directs you shall do if there be any danger of collision. A steamer is two miles off: all its lights are seen for five or six or ten minutes, — the account the second mate gives is ten minutes. Can that state of things exist without there being some danger of collision? If so, it is quite clear that they ought to put the helm a-port. Then it is said, that, immediately afterwards, one of the lights disappeared. If that had permanently disappeared, it would be all right:

but the statement of the master is this: "The steamer was then two miles off; it was one point on our starboard bow. I gave directions as to the light, and saw it go over the starboard bow. I watched the steamer till I lost sight of the red, and saw the green light. She came on thus a very short time. The moment the red light appeared again, I put my helm a-port." Why did he put his helm a-port when the red light reappeared? Because he knew that seeing all the three lights was dangerous. Why did he not do that when he saw the three lights before? If he had done that, he would have escaped. I am desirous of expressing an opinion to this effect, so far as it is for me a matter of law; and that is, that, whatever be the distance, if there is any danger of a collision, no man can be wrong if he puts his helm a-port. I think that very much supersedes the learned counsel's reference to some supposed rule, not always acquiesced in, but not in the act of parliament: and the object of this with all parties concerned in the administration of justice, is, to endeavour to make those rules as practical and practicable as they can be made, and to diminish the chance, as far as possible, of those fatal accidents that occur at sea. The question for you, in point of fact, is this: Do you believe, that, at the distance that the steamer was when she was first seen, and was seen in the way described for ten minutes, there was danger of collision? She was first seen two miles off, and she was going at the rate of nine miles an hour. Where would she be at the end of ten minutes? Was there any danger of collision? If you think that, I must lay it down as matter of law, that the defendant's master or mate, whoever had the command of the vessel, ought to have gone to the right, that is, he ought to have ported his helm. If you think so, then the plaintiff will be entitled to recover.

The jury returned a verdict for the plaintiffs for 147*l.*, the amount of the damage sustained.

Chambers now moved for a new trial, on the ground of misdirection. The Lord Chief Baron misconstrued the direction given in the act of parliament, and so misled the jury. It is for the master or other person having charge of the vessel to judge whether or not there be risk of collision. Here, the master of the defendant's vessel perceived no danger until all the three lights opened upon him the second time, and then he put his helm a-port, but too late to avoid the collision.

[*Jervis, C. J.* Suppose the master formed a wrong judgment, would not the owner be liable?]

The owner would not be liable, if the master swears he saw no danger of a collision. His lordship put it upon the admiralty regulation.

[*Maule, J.* The only effect of the admiralty regulation, is, to substitute the sailing directions there given for the rule of practice which existed before, — to make it more effective; not to alter the proof of negligence.]

There was no evidence here of negligence on the part of the master of the defendant's vessel.

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JERVIS, C. J. I see no reason for finding fault with the way in which the Lord Chief Baron left this case to the jury, and therefore I think there ought to be no rule.

The rest of the court concurring.

*Rule refused.*¹

WOOD v. THE GOVERNOR AND COMPANY OF COPPER MINERS IN ENGLAND.

June 12, 1854.

Contract, Construction of—Covenants, Independent—Company of Copper Miners—Statute, Construction of.

An agreement made on the 21st of July, 1849, between the plaintiff and the defendants, recited that the plaintiff had erected a factory on land of the defendants for the purpose of manufacturing patent fuel; that the defendants had advanced the plaintiff 2,500*l.* towards the erection of the factory, and had agreed to grant the plaintiff a lease of the land and buildings, and to enter into conditions for the supply of coal for the manufactory and otherwise. The agreement contained the following clauses: 1. The defendants were to grant the plaintiff a lease of the land, &c., for the term of twelve years from the 25th of March last past, at a peppercorn rent, and the plaintiff was immediately thereupon to assign the lease by way of mortgage to the defendants, as security for the repayment of the advance and interest. 3. All the coals used by the plaintiff for the purpose of his manufacture during the term of twelve years were to be purchased of the defendants, provided they could supply him with the quantity that should be from time to time required by him, the coal to be good for the purpose of manufacturing steam fuel, and of that kind known as small coal; and that he was to use no other coal at the factory during the term than that bought of the defendants, except when he required more small coal than the defendants could supply him with, and except coal for the purposes of experiment. 4. The defendants were not to be liable to supply more than 500 tons per week, and if they should be unable from some substantial cause to supply small coal, they were to give the plaintiff six months' notice of such inability. The 5th and 6th clauses contained provisions for screening the coal and returning rubble coal. 7. If the coal delivered should not be of such quality as to be fit for the purposes of his manufactory, fourteen days' notice was to be given by the plaintiff. 10. The plaintiff was not to remove or take down the factory or machinery, but the same was to remain as security to the defendants for advances and for the price of the coal; and on the payment of the balance due during or at the end of the term, the company were to take the machinery and fixtures at a valuation. 11. In the lease to be granted to the plaintiff a covenant was to be inserted that the plaintiff was not to use the premises for any other purpose but the manufacture of patent fuel. 12. In case the plaintiff should cease to use the small coal of the defendants by reason of their inability to supply him, and should continue to occupy the premises, he was to pay 100*l.* a year for the rent of the premises. 13. That the agreement, determinable as aforesaid, should continue for the term of twelve years from this date. An action was brought by the plaintiff for a breach of the implied contract to supply 500 tons of small coal weekly:—

Held, on demurrer to several pleas. First, that the granting of a lease by the defendants was not a condition precedent to supplying the coal; that the two covenants were independent;

¹ The owners of *The Maria* afterwards proceeded against *The Clarence* in the Admiralty Court, and there recovered the amount of damage sustained by *The Maria* from the collision. See 17 & 18 Vict. c. 104.

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and that the "term of twelve years" in the third clause of the agreement did not refer to the other twelve years for which the lease was to be granted. Secondly, that the inability to supply the coal from a substantial cause mentioned in the fourth clause was no excuse for not supplying it, unless the six months' notice of the inability had been given by the defendants. Thirdly, that the agreement referred only to coals required by the defendants for the manufacture of patent fuel.

An act of parliament, the 14 & 15 Vict. c. 105, was passed on the 21st of July, 1851, called The Governor and Company of Copper Miners' Act, 1851, for arranging the affairs of the defendants; and its 22d section provided that, after a certain reconveyance, the defendants should hold their property discharged from all rights and claims of all creditors and claimants. The 12th section referred to another action previously brought by the plaintiff against the defendants on the same contract, and which had been referred to an arbitrator, and provided that the plaintiff should be considered as a creditor for a certain amount till the award was made:—

Held, that the 22d section referred to debts or liquidated claims, and was not a bar to the action in respect of the damage which accrued after the passing of the act.

THE declaration stated that, on the 21st of July, 1849, by a certain agreement in writing, made between the defendants of one part, and of the plaintiff of the other part, and sealed with the common seal of the company, after reciting, amongst other things, that the plaintiff had erected a factory, works, and buildings, on part of a certain piece of land belonging to the defendants at Port Talbot, in the county of Glamorgan, for the purpose of carrying on the manufacture of patent fuel, and that the defendants had agreed to grant a lease of the piece of land, and the manufactory, and buildings, and other the premises to the plaintiff, and to enter into certain other arrangements for the supply of coal to the manufactory, and otherwise, on the terms and conditions in the agreement mentioned, it was agreed by and between the plaintiff, and defendants, amongst other things, that the defendants should grant a lease of the piece of land, with the manufactory, buildings, and other machinery thereon, to the plaintiff for the term of twelve years from the 25th of March then last, at a peppercorn rent; that all the coals consumed and used by the plaintiff for the purpose of his manufactory during the term of twelve years, should be bought and purchased of the defendants, provided that the defendants could and should supply him with the quantity that should from time to time be required by the plaintiff, or to such extent as the defendants could supply, and that the defendants should charge for the same at and after the rate of 3s. 10d. per ton, delivered over the weighbridge on the premises of the plaintiff at Port Talbot, and no more, the coal to be that which was clean and good for the purpose of manufacturing steam fuel, and to be that known as small coal, unscreened, unless passed through a screen of longitudinal bars not less than four inches apart, and that the plaintiff should use and consume no other coal at the factory during the term, than that bought and purchased of the defendants, excepting, nevertheless, in the event of the plaintiff requiring more small coal than the defendants could and should supply him with, and excepting, nevertheless, for the purpose of making experiments in the manufacture of fuel, in which case, the plaintiff was to be at liberty to purchase and consume coal not being the defendants' coal, such purchase and consumption of coal for the purpose of experiment not to exceed fifty tons in quantity from any six collieries

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in any one year. That the defendants should not be compelled to supply more than 500 tons per week; and that in case the defendants should, from some substantial cause, be unable to supply small coal to the extent agreed upon, the defendants should give to the plaintiff six months' notice of such their inability, and in such case, the plaintiff should be at liberty to obtain his supply of coal, or the excess beyond the quantity the company could supply, from any other source; and the agreement was made determinable on certain events therein mentioned, and, subject thereto, was to continue for the term of twelve years from the date thereof. That, although at all times after the making of the agreement, the plaintiff was ready and willing to receive from the defendants, and required the defendants to deliver to him 500 tons of the small coal per week, and although the defendants were not unable from any substantial cause so to supply the same or any part thereof, and although the plaintiff hath done all things on his part to entitle him to have the 500 tons of small coal per week delivered to him, yet the defendants did not nor would after the making and during the continuance of the agreement, deliver to the plaintiff 500 tons of the small coal per week; but, on the contrary thereof, although after the making and during the continuance of the agreement in each of the weeks commencing with the week which expired next after the 24th of January, 1848, until the time of the commencement of this suit, the plaintiff required the defendants to deliver to him 500 tons of the small coal, and during each of those weeks, and during all the time, was ready and willing to buy of the defendants those quantities of the coal so required by him, and to pay for the same at the rate and price in that behalf agreed, and although the defendants were not unable from any substantial cause so to supply the same, the defendants did not nor would in any or either of those weeks supply the plaintiff with 500 tons, or any quantity, of the small coal, according to their covenant in that behalf, but therein made default; whereby and by reason of the plaintiff not being able to procure the quantities of small coal elsewhere, he, the plaintiff, was, during all those times, wholly prevented from carrying on the manufacture of the patent fuel: and whereby he lost and was deprived of great gains and profits which he might and otherwise would have obtained by carrying on the manufacture, and is otherwise greatly damnified. And the plaintiff claims 60,000*l*.

First plea — That the agreement in the declaration mentioned, was and is to the following tenor and effect: "An agreement made and entered into on the 21st July, 1847, between the Governor and Company of Copper Miners, in England, of the one part, and H. W. Wood, of Briton Ferry, near Neath, in the county of Glamorgan, manufacturer of fuel, of the other part. Whereas, H. W. Wood has lately erected a factory, works, and buildings on part of a certain piece of land, belonging to the governor and company, situate at Port Talbot, in the county of Glamorgan, South Wales, for the purpose of carrying on the manufacture of patent fuel. And whereas, the governor and company have advanced and paid to H. W. Wood, for and towards the erection and completion of the factory, works,

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and buildings, and machinery therein, divers sums of money, amounting in the whole to the sum of 2,500*l*. And, whereas, the governor and company have agreed to grant a lease of the piece of land and the manufactory and buildings and other the premises to H. W. Wood, and to enter into certain other arrangements for the supply of coals for the manufactory, and otherwise, on the terms and conditions hereinafter mentioned. Now, these presents witness, and it is hereby agreed by and between the parties in manner following, that is to say: First, that the governor and company shall grant a lease of the plot or parcel of land with the manufactory, buildings, and machinery thereon, to H. W. Wood, for the term of twelve years, from the 25th of March, last, at a peppercorn rent, such lease and counterpart thereof to be prepared at the expense of H. W. Wood. That, immediately upon such lease being so granted by the governor and company, he, H. W. Wood, shall execute an assignment thereof by way of mortgage to the governor and company, or their trustees, as a security for the replacement of the sum of 2,500*l*., with interest after the rate of 5*l*. per cent. per annum, within seven years from the date thereof, such mortgage to contain a power of sale and all other usual powers. Secondly, that the patent fuel manufactured by H. W. Wood, on which he may require an advance, shall from time to time be placed and laid down upon a certain piece of land which shall be adjoining to the piece of land hereby agreed to be demised, but divided off for that purpose and for the purpose next hereafter mentioned, and shall there be and remain in the possession of the governor and company as a security for any moneys at any time due and owing to the governor and company by H. W. Wood, on any account whatsoever, excepting the sum of 2,500*l*., under or by virtue of this agreement; provided, nevertheless, that such deposit of fuel and such advance or advances shall in no way prevent or prejudice the sale of fuel from time to time, by H. W. Wood, who, for that purpose, shall have full liberty to ship or give delivery order for the same; H. W. Wood, in that event, depositing or agreeing to deposit with the company the cash or approved bills to be received by him as the price of or advance upon such fuel, when and as the same shall be sold. Thirdly, that all the coal consumed and used by H. W. Wood for the purpose of his manufacture during the term of twelve years, shall be bought and purchased of the company, provided the company can and shall supply him with the quantity that shall from time to time be required by him, or to such extent as the company can supply, and that the company shall charge for the same at and after the rate of 3*s*. 10*d*., per ton, delivered over the weighbridge on the premises of H. W. Wood, at Port Talbot, and no more; the coal to be that which is clean and good, for the purpose of manufacturing steam fuel, and to be that which is known as small coal, unscreened, unless passed through a screen of longitudinal bars not less than four inches apart, and that H. W. Wood shall use and consume no other coal at the factory during the term, than that which is bought and purchased of the company, excepting, nevertheless, in the event of H. W. Wood requiring more small coal than the company can and shall supply him with,

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and excepting, nevertheless, for the purpose of making experiments in the manufacture of fuel, in which case, H. W. Wood is to be at liberty to purchase and consume coal not being the company's coal, such purchase and consumption of coal for the purposes of experiments, not to exceed fifty tons in quantity from any six collieries in any one year. Fourthly, that the company shall not be compelled to supply more than 500 tons per week, and that in case the company shall, from some substantial cause, be unable to supply small coal to the extent agreed upon, the company shall give to H. W. Wood six months notice of such their inability, and in such case, H. W. Wood shall be at liberty to obtain his supply of coal or the excess beyond the quantity the company can supply from any other source. Fifthly, that all coal supplied to H. W. Wood by the company, shall be delivered over the weighbridge erected at Port Talbot, at the Patent Fuel Works, at the rate of 3s. 10d. per ton, including the use of trains, wagons, haulage, and other necessary incidental expenses to the weighing machine, and the use of trains from the weighing machine to the manufactory, such further haulage to be at the expense of H. W. Wood; and H. W. Wood shall, if he shall so think fit, be at liberty to pass the coal over a screen of longitudinal bars not less than half an inch apart, and all coal which will not pass through such screen, shall be deemed rubble coal, and shall be taken back by the governor and company within fourteen days after notice in writing shall have been given, as next hereinafter is mentioned, and paid for by them in cash at the rate of 1s. 6d. per ton, at the periods hereinafter specified for the rendering accounts of all coal delivered. Sixthly, that the company shall supply to H. W. Wood, in lieu and in place of the rubble coal so returned, free of cost and expense to him, an equal quantity of the coal hereby agreed to be delivered within fourteen days after notice in writing shall have been given, specifying as nearly as is practicable, the quantity so to be removed; and in case the company shall neglect to remove the rubble coal, and to replace the same with such as aforesaid, within the time aforesaid, they shall pay to H. W. Wood the sum of 2*l.* per diem, to be recovered as liquidated damages. Seventhly, that if the coal shall not be of such quality of small coal as is required by H. W. Wood, and fit for the purpose of manufacture, the same shall be notified to the company within fourteen days after the same shall have been delivered, otherwise the same shall be deemed and taken to be good and sufficient for the purposes, and shall be charged for accordingly; but in case H. W. Wood shall give notice to the company within the period of fourteen days that the coal is not good and fit for the purposes of the manufactory, then the company shall either take back the same, or shall, within seven days after such notice shall have been delivered, refer the question to the decision of an individual to be agreed upon between them and H. W. Wood, or, in case they cannot agree, shall give the name of a referee, who, together with a referee to be named by H. W. Wood, or such third party as such two referees shall appoint, shall award and determine whether such small coal be good and sufficient for the purpose of the manufacture and as agreed for, and in

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either of the cases, the company and H. W. Wood shall be bound by such decision. Eighthly, that H. W. Wood shall be at liberty to erect a shipping-stage adjoining the fuel manufactory on the River Avon, and the company shall contribute towards the cost and expense of erecting the same, when and after the same shall have been erected, a sum not exceeding 50*l.*, and shall also allow H. W. Wood, for the purpose of shipping patent fuel or receiving pitch, to make use of some one of their shipping stages and weighing machines, on regular turn, due diligence being at all times used, on the float at Port Talbot, free of charge. Ninthly, that the accounts for all coals delivered by the company to H. W. Wood, after the rate of 3*s.* 10*d.* per ton, shall be rendered to H. W. Wood every three months, and shall include all coals delivered during that period, and if no objection be stated to that account within ten days after the same shall have been delivered, the same shall be taken (errors excepted) as a correct account, and H. W. Wood shall be debited on the 10th of the succeeding month with the amount found to be due to the company upon such account, and H. W. Wood shall thereupon accept the drafts or bills of the company for the amount so appearing due, such bills or drafts, including interest at 5*l.* per cent., and to be drawn at not less than twelve months date.

Tenthly, that H. W. Wood shall not take down or remove the manufactory and premises so erected and built, or the machinery in and about the same, but that such buildings, erections, and machinery shall be and remain as a security to the company for all moneys that shall at any time be due or owing to them, either on account of advances incident to the erection of such buildings and machinery, or for advances made upon manufactured fuel, if any, or for moneys that shall be due in respect of coals supplied, or any other account whatever under or by virtue of this agreement; provided always, nevertheless, that upon H. W. Wood paying or securing any balance that may at any time during the continuance or at the determination of this agreement be due from H. W. Wood to the company, and the company shall, if required so to do by H. W. Wood, take, at a valuation to be made by a referee or referees so to be chosen as aforesaid, the machinery and fixtures of and upon the manufactory and premises. Eleventhly, that in the lease to be granted to H. W. Wood, a covenant for title shall be inserted on the part of the company, and covenants shall be inserted on the part of H. W. Wood, that the premises so to be leased shall not be used for any other purpose or purposes than that for the manufacture of patent fuel, and that H. W. Wood shall not underlet or assign the premises or any part thereof without the consent of the company, such consent not being unreasonably withheld. Twelfthly, that in case H. W. Wood shall cease to use and consume the small coal of the company by reason of their inability to supply him therewith, as hereinafter mentioned and agreed or otherwise, and H. W. Wood shall continue in the occupation of the premises, and he the said H. W. Wood shall pay to the company a rent or sum of 100*l.* per annum during the continuance of this agreement, such rent to commence within six

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months after H. W. Wood shall so cease to use and consume the small coal of the company. Thirteenthly, that the agreement to be determinable as aforesaid shall continue for the term of twelve years from the date hereof, and that, at the expiration of the term of twelve years from the date hereof, if H. W. Wood shall so elect and determine, and of such election or determination shall give one month's notice in writing to the company, but not otherwise, the company shall pay or allow to H. W. Wood the then value of the machinery and fixtures, such value to be ascertained by arbitration in the manner hereinafter mentioned. Provided always, and it is hereby agreed and declared between and by the parties hereto, that if at any time during the continuance of this agreement any disputes or differences shall arise between the parties respecting any clause, matter, or thing herein contained or relating to the premises, or otherwise arising out of this agreement, the same shall be referred to the arbitration of two indifferent persons, one to be chosen by each party, and the decision or award in writing of such arbitrators, in case they shall agree upon the matters in dispute, or of their umpire, which they are hereby authorized to appoint in case they shall differ, shall be binding and conclusive on the parties hereto, provided such award, whether by the arbitrators or their umpire, shall be in writing, and be delivered to the parties within one calendar month after the matters therein contained shall have become the subject of reference to arbitration, provided that the piece or parcel of land, manufactory, and premises shall not be a security for a larger amount than 5,000*l*. In witness whereof the governor and company of copper miners have hereunto caused their common seal to be affixed, and H. W. Wood hath hereunto set his hand and seal, the day and year first above written." That no lease of the piece of land with the manufactory, buildings, and machinery thereon has ever been granted by the defendants to the plaintiff.

Second plea — That the plaintiff did not in each or any of the weeks in the alleged breach of the agreement mentioned, require the defendants to deliver to him 500 tons, or any quantity of the small coal, and the same was not then required by him for the purposes in the agreement mentioned; and the plaintiff was not during any part of the period of time ready and willing to buy of the defendants, and accept from them, any quantities of the coal for the purposes in the agreement mentioned, and to pay for the same.

Third plea — That from and after the 24th of January in the breach of the agreement mentioned until the commencement of this suit, the defendants were prevented by a substantial cause from supplying coal to the plaintiff according to the agreement.

Fourth plea — That before and on the 24th of January in the declaration mentioned, and from thence until the commencement of this suit, the plaintiff wholly discontinued and abandoned and ceased to carry on the factory, works, and buildings, the manufacture of the patent fuel in the agreement mentioned; such discontinuance, giving up, abandonment, and cessation of the manufacture not being caused

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through the non-delivery of coal by the defendants to the plaintiff, or by any other breach of the agreement by the defendants.

Fifth plea — That the defendants did in each of the weeks in the declaration mentioned supply the plaintiff with all such quantities of coal as were there required of the defendants by the plaintiff to be delivered to him for the purposes of the manufacture.

Sixth plea — As to so much of the claim of the plaintiff as relates to that part of the alleged breach of the agreement which extends from the 24th of January in the declaration mentioned to the 24th of July, 1851, the last-mentioned day being the day of the passing of the "Governor and Company of Coppers Miners Act, 1851,"¹ the defendants say, that in respect of so much of the claim, the plaintiff at the time of the passing of the act was a present creditor and claimant against the defendants within the meaning and intent of the act. That after the passing of the act, and before the commencement of this suit, the lands, mines, collieries, hereditaments, the plant, machinery, fixtures, and effects mentioned in the act and comprised in the mortgage security in the act recited, were under the provisions of the act duly reconveyed to the defendants by the governor and company of the Bank of England.

Demurrer to the first, third, fourth, fifth, and sixth pleas, and issue joined on the second, third, fourth, and fifth pleas. Replication to the first, third, fourth, fifth, and sixth pleas.

Willes, appeared for the plaintiff; and

Bovill, (*Turner* with him,) for the defendants, 8th and 9th of May.

The points raised in the argument are so fully adverted to in the judgment, that a further report of them is deemed unnecessary.

Cur. adv. vult.

The judgment of the court² was now delivered by

CROWDER, J. This was an action of covenant, brought upon an agreement under seal, executed by the plaintiff and the defendants. The declaration was framed upon the alleged breach of an implied covenant in the agreement to supply 500 tons of small coal to the plaintiff weekly during a specified period. To this declaration the defendants pleaded six pleas, to five of which the plaintiff demurred; the demurrers were argued before us, in the course of last term. Four principal points were made upon the argument: First, that the defendants' liability to supply the coal depended upon a lease being granted by them to the plaintiff, as a condition precedent. Secondly, that the defendants' inability to supply the coal exonerated

¹ 14 & 15 Vict. c. 105. The material parts of the act are set out in the judgment.

² JERVIS, C. J., CRESSWELL, J., WILLIAMS, J., and CROWDER, J.

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them from liability on the covenant, without the six months' notice being given which is mentioned in the agreement. Thirdly, that the supply of coal was limited to the purposes of the patent fuel manufacture, mentioned in the agreement. Fourthly, that the plaintiff was a claimant against the defendants, within the meaning of the act of 14 & 15 Vict., and so barred as to that portion of the claim which arose prior to the 24th of July, 1851, when that act passed. The first point was raised by the demurrer to the first plea, which sets out the agreement at full length, and concludes with the allegation, that "no lease of the said piece of land with the manufactory, buildings, and machinery thereon, has ever been granted by the defendants to the plaintiff."

The agreement, which is between the defendants of the one part, and the plaintiff, a manufacturer of fuel, of the other part, recites that the plaintiff had lately erected a factory, works, and buildings on part of a certain piece of land belonging to the defendants, situate at Port Talbot, in Glamorganshire, for the purpose of carrying on the manufacture of patent fuel. That the defendants had advanced to the plaintiff towards the erection and completion of the factory, works, and buildings, and the machinery thereon, 2,500*l.*; and that they had agreed to grant a lease of the said piece of land, and the manufactory and buildings, and other premises, to the plaintiff, and to enter into certain other arrangements for the supply of coal for the said manufactory, and otherwise on the terms and conditions thereafter mentioned. Then follow the stipulations of the agreement, embodied in the thirteen clauses, the first, third, fourth, tenth, eleventh, twelfth, and thirteenth of which were principally relied upon in the argument. The plaintiff's counsel referred to a similar action between the same parties and upon the same agreement, (7 Com. B. Rep. 906,) in which it was decided by this court, that the stipulation for the supply of coal, by the defendants to the plaintiff, constituted a covenant; and he contended, that such covenant was for the continuance of a supply for twelve years, whether a lease were granted or not; that this covenant was entirely disconnected in grammatical construction from the stipulation for the granting of a lease in the first clause of the agreement, and that it was quite unnecessary, in order to give effect to the apparent intention of the parties, that the granting of a lease should be construed to be a condition precedent; that as the lease contemplated was to be at a peppercorn rent, it was for the plaintiff's exclusive advantage, and could not, therefore, operate as a consideration for the defendants' supply of coal. On the other hand, it was contended by the defendants' counsel, that admitting the decision of this court, as reported in 7 Com. B. Rep., to be right, for the purpose of argument only, the granting of a lease was a condition precedent to the defendants' liability upon the covenant, and he relied specially on the language of the first, third, fourth, tenth, eleventh, and thirteenth clauses, as establishing that proposition. He contended, that as the term of twelve years, from Lady-day last, was to be created by the lease agreed to be granted by the first clause, the implied covenant in the third and fourth clauses for the delivery of

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500 tons of coal weekly to the plaintiff, was applicable only to the term so to be created; and as no lease had been granted, no term had been created, and so no obligation incurred, on the part of the defendants, to supply the coal. And the cases of *Soprani v. Skurro*, Yelv. 18; *Pitman v. Woodbury*, 3 Exch. Rep. 4; and *Swatman v. Ambler*, 8 Exch. Rep. 72; s. c. 16 Eng. Rep. 539, were cited in support of that argument. Moreover, it was denied that the lease was exclusively for the plaintiff's benefit, as by the first and tenth clauses it was to be assigned to the defendants immediately after its execution, by way of mortgage, as a security for the advances made to the plaintiff. And by the eleventh clause, the plaintiff was restricted from underletting or assigning the premises without the consent of the defendants. It was further argued, that the defendants would obtain by the lease the advantage of a solemn admission on the part of the plaintiff, that the premises, including the factory, buildings, and machinery, were the property of the defendants; that, by the first and thirteenth clauses, it appears that the term in the lease was to be of a different duration from the term of the agreement; the former being twelve years from Lady-day last past, the latter, twelve years from the date of the agreement, and that, therefore, the covenant to supply the coal in the third and fourth clauses, could only apply to the term in the lease; that, the expression in the third clause, "during the term of twelve years," had relation to the lease, mentioned in the first clause; and showed that the supply was to be, not during the agreement, but for the term to be created by the lease. But, we think the plaintiff's construction of the agreement is the correct one, and that the cases cited, on the part of the defendants, do not apply. The ground of the decision in those cases was, that there was no consideration for the covenant, because the covenantee had not executed the deed in which the covenant was contained; whereas, in the present case, both parties executed the agreement. The granting of the lease is a part of the agreement to be performed by the defendants, who have also covenanted to supply the coal weekly to the plaintiff. The lease was mainly for the benefit of the plaintiff, as it appears from the recitals that the buildings had already been erected on the defendants' land prior to the execution of the agreement, and the rent was to be merely nominal. And we think that the words, "term of twelve years," and "term aforesaid," occurring in the third clause, do not mean the "term" to be created by the lease in the technical sense of that expression, but that the true meaning of the word "term" there, is "period" or "space of time." And thus the covenant to supply the coal for the said period of twelve years, from Lady-day last, would be quite consistent with the non-existence of a lease, and also with the duration of the agreement for a still longer time, as stipulated in the thirteenth clause. The defendants having entered into two covenants, first, to grant a lease to the plaintiff, and, secondly, to supply him with coal for twelve years, it would be unreasonable to hold, unless constrained by the clearest language, that the defendants' non-performance of their first covenant exonerated them from liability to perform the second also. We think, therefore,

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the granting of the lease is not a condition precedent, and that, consequently, the first plea cannot be supported. There will be judgment for the plaintiff, therefore, upon the demurrer to that plea. The second point was raised by the demurrer to the third plea, which alleges, "that from the said 24th of January in the said declaration mentioned, until the commencement of this suit, the defendants were prevented, by a substantial cause, from supplying the said coal to the plaintiff, according to the said agreement." It was attempted, on the part of the defendants, to support the plea, on the ground that it was merely a traverse of the averment in the declaration, "that the defendants were not unable to supply the coal from any substantial cause." But unless this traverse, if found by the jury for the defendants, would be a good defence to the action, the plea cannot be sustained. And we think that the inability to supply from any substantial cause is no defence, unless six months' notice thereof be given, according to the express words of the fourth clause. And this seems reasonable, for, otherwise, the defendants might be relieved from their covenant to supply the plaintiff with coal, while the plaintiff would be bound, by his covenant, not to get coal elsewhere: as it is only in case of the inability of the company to supply, and six months' notice thereof given to the plaintiff, that he is at liberty to obtain a supply from any other source. Judgment, therefore, will be for the plaintiff upon the demurrer to the third plea. The third point was raised by the demurrers to the fourth and fifth pleas; the fourth plea, alleging an abandonment of the manufacture of patent fuel at the factory; and the fifth plea, alleging that the defendants supplied all coal required by the plaintiff for the purposes of the said manufacture. The substantial question arising upon both pleas is, whether the covenant to supply coal is limited to the purposes of the patent fuel manufacture, or whether it is to be for any other purpose required by the plaintiff. It was contended by the plaintiff's counsel, that the recital in the agreement that the defendants had agreed to grant a lease, "and to enter into certain arrangements for the supply of coal for the said manufactory, and otherwise on the terms and conditions hereinafter mentioned," showed that the supply of coal was to be for other purposes besides those connected with the manufacture of fuel, the word "otherwise" furnishing this argument. But, looking at the language of the agreement throughout, and especially the third, fifth, seventh, and eleventh clauses, we are of opinion that the defendants' covenant is limited to the supply of coals for the purposes of the patent fuel manufacture. A distinction was taken in the argument between the two pleas. But, we think that each is substantially an answer to the action; and, therefore, our judgment on the demurrers to the fourth and fifth pleas will be for the defendants.

The fourth point arises upon the demurrer to the sixth plea, which is pleaded to so much of the alleged breach of the agreement as applied to the period from the said 24th of January, in the declaration mentioned, to the 24th of July, 1851, the last-mentioned day being the day of the passing of the Governor and Company of Copper Miners Act, 1851, and to that part of the claim the defendants in their sixth plea say,

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“ That the plaintiff, at the time of the passing of the said act, was a present creditor and claimant against the defendants within the meaning of the said act; and the defendants further say, that after the passing of the said act, and before the commencement of this suit, the lands, mines, collieries, and hereditaments, ore, plant, machinery, fixtures and effects mentioned in the said act and comprised in the mortgage security in the said act, were under the provisions of the said act duly reconveyed to the defendants by the Governor and Company of the Bank of England. The question upon this demurrer is, whether the plaintiff was a claimant against the defendants, within the true meaning of the 22d section of the act referred to, and as such barred from maintaining the present action. It appears from the preamble of the act, that the defendants, being in a state of great pecuniary embarrassment, were desirous of arranging their affairs, and distributing their assets ratably among their creditors; that the Bank of England had advanced large sums, and were mortgagees in possession of a considerable portion of the defendants' property, with the usual powers of sale; that there was also a large class of creditors by debentures, loan notes and promissory notes; that a suit in chancery had been instituted by the Bank of England against the defendants; and it was referred to the master to take an account of all the debts, liabilities, and engagements of the defendants, and to ascertain what creditors were entitled to the benefit of the trust deeds which had been executed by the defendants. And it appears further from the preamble, that the Bank of England had been unable to sell the property mortgaged, and were willing to give up possession upon terms advantageous to the defendants, and that “ a very large majority of the holders of debentures, promissory notes and loan notes of the defendants, and of the creditors of the defendants, were willing to compound for their claims on the defendants, and to accept payment of such composition in stock of the said company in manner set forth.” The arrangement contemplated is then carried out by the various sections of the act. And by the 22d section it is enacted, “ That on the reconveyance to the said Governor and Company of Copper Miners in England, from the said Governor and Company of the Bank of England, of the lands, mines, collieries, hereditaments, ore, plant, machinery, fixtures, and effects, comprised in the said recited mortgage security, or any part thereof, in pursuance of any arrangement to be made between them, the said lands, mines, collieries, hereditaments, ore, plant, machinery, fixtures and effects, or the part thereof comprised in such reconveyance, shall, notwithstanding the continuance of the trusts of the said recited indentures of the 19th of April, 1848, or of the said suit, vest in the said Governor and Company of Copper Miners in England; and that subject and without prejudice as to the said lands, mines, collieries, hereditaments, ore, plant, machinery, fixtures, and effects, to any such arrangements, all property and effects whatsoever to be held, possessed, and acquired by the said Governor and Company of Copper Miners in England shall be held and enjoyed by them freed and discharged from all rights, claims, and remedies whatsoever

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by or on the part of any holder of any debentures, promissory notes, or loan notes of the said Governor and Company of Copper Miners in England heretofore issued, or on the part of any other present creditor or claimant against the said Governor and Company of Copper Miners in England upon any account whatsoever, except any claim, right, or remedy of the said Governor and Company of the Bank of England, which may be mentioned in such reconveyance as reserved to or retained by the said Governor and Company of the Bank of England, and except any right or remedy of the said W. H. Lord, in respect of his costs in the chancery suit hereinbefore referred to, to an extent not exceeding 550*l*." Now, on the part of the defendants, it was contended, that the plaintiff was a present claimant against the defendants within this section; and that the word "claimant" was intended to apply to unliquidated, as the word "creditor" was to liquidated demands, and that the plaintiff's claim under the covenant was an unliquidated demand, and so would be barred by the 22d section of the act. It was answered on the part of the plaintiff that his right to sue upon this covenant did not make him a "claimant" within the meaning of the 22d section; and that if it did, there was nothing in the language of that section to deprive him of his right of action. We think, looking at the general terms of the preamble, as well as at the language of the fourth, eighth, tenth, and twelfth clauses, that the "creditor" or "claimant" mentioned in the 22d section, must be a person having a debt, or liquidated demand against the defendants, and that those words cannot, by any fair construction, include a person having a right of action for the breach of a covenant to furnish coals for a factory. It is unnecessary, therefore, to give any opinion as to the effect of the 22d section, supposing the plaintiff to be such a claimant as is included therein. The 12th section expressly refers to the former action of the plaintiff against the defendants, for a breach of the same covenant on which the present action is founded. It recites the pending of that action, and the reference of it to an arbitrator, with power to make two awards. It then recites the assessment of damages, by one award, at the sum of 2,272*l*. 2*s*.; with a reservation of certain points of law for the opinion of the court, and that no second award had been made. The section then enacts "that H. W. Wood, the plaintiff, shall be deemed and considered a creditor of the said Governor and Company of Copper Miners of England within the intent and meaning of this act, for all and every such sum and sums of money as have been and shall be awarded to the said H. W. Wood by the said T. Bros, or by any other arbitrator to whom the said cause and matters may hereafter at any time be referred in the place of the said T. Bros, or such arbitrator as aforesaid, and for any costs which shall be awarded by the said T. Bros, or such other arbitrator as aforesaid, to be paid by the said Governor and Company of Copper Miners in England, to the said H. W. Wood, and that until the said T. Bros, or such other arbitrator as aforesaid shall have made his final award, the said H. W. Wood shall be deemed and considered a creditor of the said company for the said sum of 2,272*l*. 2*s*." The insertion of

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this section shows, we think, that without it the plaintiff would not have been within the general terms "creditor," or "claimant" in the 22d section, and the claim or demand of the plaintiff is clearly confined by the 12th section to the sum awarded, and such other sum or sums as may be awarded in the former action. It would not include, therefore, the claim in the present action. And we are of opinion that there is nothing in any other part of the act to bring the plaintiff, as regards this action of covenant, within the terms "creditor," or "claimant" in the 22d section of the act. The plea, therefore, cannot be sustained, and our judgment will be for the plaintiff on the demurrer to that plea.

Judgment accordingly.

DYNE v. NUTLEY.

November 17, 1853.

Lease — Construction of.

Under a lease of "all that messuage or tenement, called, &c., now or late in the occupation of C.," the boundaries given not accurately defining the premises : —

Held, that a "gateway" under a portion of the messuage, and leading to a yard behind, in which were some small houses, not included in the demise, the tenants of which had always used the gateway, did not pass, in the absence of evidence to show that it had been in the exclusive occupation of C.

TRESPASS for breaking and entering the land of the plaintiff, called the gateway, and digging up the soil.

Pleas : first, not guilty.

Secondly, that the *locus in quo* was not the plaintiff's land.

Thirdly, that, before the committing of the alleged trespasses, Joseph Birchall, William Grey, Jeremiah Bunney, John Alexander Manasseh, James George Payne, James Bodman, William Dredge, John Kimber, John Flint, Thomas Leonard, James Hazell, Mark Willis, Thomas Simmonds, and Frederick Brown, trustees of St. Bartholomew's Charity, in Newbury, in the county of Berks, were seised of the land in question in their demesne as of fee; that they leased the same to William Nutley, (the defendant,) and William Mundy, to hold the same for fourteen years from the 29th of September, 1852; and that, by virtue of that demise, the defendant and Mundy entered upon the land, and upon the plaintiff's alleged possession thereof, dug the hole, and pulled down the gates, &c.

Fourthly, that, before the committing of the trespasses complained of, the trustees of St. Bartholomew's Charity were seised as of fee, and leased the premises to William Nutley and Robert Mundy for fourteen years; that, by virtue of that demise, the defendant and Mundy entered on the land, and demised the same to one Joseph

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Corderoy, to hold for one year, and so on from year to year; that Joseph Corderoy entered under that demise; and that the defendant, by his command, dug the hole, and pulled down the gates, &c.

Fifthly, as to the breaking and entering and destroying the gates, that, before the committing of the trespasses, the trustees were seised in their demesne as of fee of certain messuages and premises, and also of a yard and buildings, on the south side of Speenham Land, in the county of Berks, and demised and leased the said yard and buildings to the defendant for fourteen years from the 29th of September, 1852, and by deed granted to the defendant and Robert Mundy a way for themselves and their servants; and that the defendant committed the alleged trespasses in the assertion of his right of way.

The plaintiff took issue on the first, second, fourth, and fifth pleas, and traversed the third.

The cause was tried before Coleridge, J., at the last Assizes at Abingdon. The facts which appeared in evidence were in substance as follows: The plaintiff was the lessee and occupier of an inn called the Fighting Cocks, at Speenham Land, near Newbury, in Berkshire, which was described in the lease of the 29th of September, 1852, as, "All that messuage, tenement, or public house, on the south side of Speenham Land, called The Old Fighting Cocks, now or late in the occupation of Joseph Corderoy as undertenant of William Nutley, brewer, bounded on the west by a yard, &c., messuage, or tenement, now in the occupation of John Bunker, cooper, and on the east by a messuage or tenement now unoccupied; together with all ways, &c., thereto belonging or appertaining." The lease also contained covenants on the part of the lessee to keep the tenement, and all out-houses, &c., in repair, together with all gates and boundaries thereof, and to keep the premises open as an inn.

The Fighting Cocks fronted the street, having a gateway under a portion of it, leading to the yard and outbuildings. In this gateway the defendant, who became possessed of a house (used as a beer-shop) adjoining (which, together with the plaintiff's premises, all formed part of one estate) dug a hole and made a way to his cellar, covering it with a wooden flap. This, and the breaking the gates, constituted the trespasses complained of.

The question was, whether the soil of the gateway passed to the plaintiff by the lease of the 29th of September, 1852. The learned judge thinking the description of the premises in the lease ambiguous, evidence was gone into to show what had been the occupation of Joseph Corderoy.

It appeared that the entire premises had originally been held by one tenant, but that they had been severed about fourteen years ago, and three small houses and some other erections built in the yard, the tenants of which all used the gateway without interruption. There was no evidence of any exclusive occupation, or of the exercise of any acts of ownership or control by Corderoy over the gateway, save that he locked the gates at night; the key, however, being hung up in a place where all persons using the way could get at it. The gates had

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been originally put up, and were occasionally repaired, and from time to time renewed, by and at the expense of the owners of the fee.

The learned judge told the jury that the description in the lease of the boundary on the west was incomplete, and therefore it was necessary to have recourse to the evidence to show what had been in the occupation of Corderoy; and he left it to them to say whether or not it had been made out to their satisfaction that the "gateway" had been in the occupation of Corderoy.

The jury found that it had not, and accordingly returned a verdict for the defendant on the second issue, and for the plaintiff on all the other issues.

Phipson, on a former day in this term, obtained a rule *nisi* for a new trial, on the ground of misdirection, and that the verdict was against evidence. He submitted that the learned judge should have directed the jury, as a matter of law, that the gateway was part of the demised premises; and that, at all events, the evidence showed that it formed part of the subject of demise.

Keating and *Gray* now showed cause. The jury were properly directed, and they came to a right conclusion upon the evidence before them. The description of the boundaries in the lease is obscure and ambiguous; it was necessary, therefore, to have recourse to the other words of description, "Now or late in the occupation of Joseph Corderoy." The evidence showed, that, during Corderoy's tenancy, the gateway was used in common by all the tenants of the property. It is quite consistent with the gateway being in the occupation of nobody.

[MAULE, J. The rule of construction is, that you must satisfy all the words if you can consistently. If the description had been "abutting" on a passage and a messuage," there would have been no doubt. A cabbage-garden on the other side of the road, if occupied by Corderoy, would have passed.]

It is perfectly clear, as well upon the description in the lease, as upon the parol evidence, that this gateway did not, and never was intended to pass by the lease to the plaintiff.

Phipson, in support of his rule. In Sheppard's Touchstone, p. 12, it is laid down, that, "by the name of a messuage may pass a house, a curtilage, a garden, an orchard, a dove-house, a shop, a mill, as parcel of the same; and even land, as hams and grounds (as paddocks) attached to the house." That word alone is large enough to include the yard and all the buildings at the bottom of the yard.

[MAULE, J. We should have nothing to inquire about, if there were not words enough to include it.]

In *Doe d. Smith v. Galloway*, 5 B. & Ad. 43, under a lease of all that part of the park called Blenheim Park, situate and being in the county of Oxford, and now in the occupation of Smallbones, lying within certain specified abutments, with all houses, &c., belonging thereto, and which are now in the occupation of Smallbones — it was

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held that a house on a part which was within the abutments, but not in the occupation of Smallbones, would pass. "The rule," said Parke, B. "is clearly settled, that, when there is a sufficient description set forth of premises, by giving the particular name of a close, or otherwise, we may reject a false demonstration; but that, if the premises be described in general terms, and a particular description be added, the latter controls the former." Here, the premises were described with sufficient accuracy. And the evidence was as consistent with the notion that the soil of the gateway passed by the lease as with the contrary notion.

JERVIS, C. J. I am of opinion that this rule should be discharged. *Doe d. Smith v. Galloway* is an authority to show that the learned judge correctly left the case to the jury. That which my brother Parke there lays down is expressly in point. Then, there being no misdirection, the objection is reduced to a verdict against evidence. I see no reason to find fault with the conclusion at which the jury arrived.

MAULE, J. I am of the same opinion. I think this is a perfectly clear case. It was an essential part of the plaintiff's case to show that the place where the hole was dug had been in the occupation of Corderoy. That disposes of the question of misdirection. Mr. Phipson very properly admits that this is not like the case where, after a proper description of the premises by name or abutments, there is an affirmation of the occupation; but that here there is an essential statement of the occupation. As to the evidence, I am not disposed to think the jury have come to a wrong conclusion. It was for them to say whether or not the evidence satisfied them that this gateway had been in the occupation of Corderoy. I see no ground upon which we can or ought to interfere.

WILLIAMS, J. I am of the same opinion. Mr. Phipson was constrained to admit that the words "now or late in the occupation of Joseph Corderoy," were essential words, and not mere words of demonstration, and that it was requisite for him to resort to those words to carry certain accretions which would not have passed otherwise. It was, upon the face of the lease, a case of equivocation; and the evidence, I think, showed very satisfactorily that the gateway was not in the "occupation" of Corderoy. I see no ground whatever for disturbing the verdict.

TALFOURD, J., concurred.

Rule discharged.

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GALLOWAY and another v. KEYWORTH and others.

May 25, 1854.

Costs, Taxation of — Materiality of Witness — Award, Costs of Preparing — Lay Arbitrator — Professional Assistance.

On taxation of costs, it is a general rule to disallow the expenses of a witness rejected by the judge at the trial, as between party and party.

The same rule applies to a witness rejected by an arbitrator; and where a case on being called on for trial was referred, and a witness who attended at the place of trial and afterwards before the arbitrator on the reference, was rejected by the arbitrator, the master was held to have rightly disallowed his expenses, as between party and party.

The materiality of a witness is *prima facie* a question for the master, but the court may review his decision on that point.

In an action for a proportion of the saving of coals effected by a patent boiler erected by the plaintiff according to a contract, an engineer attended at the trial, and before the arbitrator, who had not seen the boilers in question, but had seen the working of similar ones.

Quære, whether he was a material witness.

Semble, per MAULE, J., that he was not material as between party and party.

Semble, that a lay arbitrator may employ a professional person to prepare his award; per MAULE, J., that he ought to do so. But where a separate charge was made for an attorney's costs of preparing the award, the arbitrator having charged a sufficient sum for the award:—

Held, that the master was right in disallowing the amount of the attorney's bill in the costs.

THIS was an action upon a contract for the construction of three new patent steam-engine boilers, for which the plaintiffs were to be paid three fourths of the saving in coals to the defendants by means of the boilers in the first five years. There was a plea of payment of money into court, and the only question to be tried was the amount of damages.

On the case being on for trial, at the Liverpool Summer Assizes, in 1852, a verdict for the plaintiff for the damages laid in the declaration was taken by consent, subject to a reference to an engineer. The arbitrator afterwards made his award in favor of the plaintiffs; and they signed judgment for 137*l.* damages, and 40*s.* costs. At his taxation of costs on the 24th of April, 1854, a claim of 25*l.* was made, on behalf of the plaintiffs, for the costs of the attendance of a witness named Armstrong, an engineer, at the trial, and before the arbitrator, and whose evidence had been rejected by the arbitrator. For the plaintiffs, it was alleged, that Armstrong attended, by the advice of counsel, and was skilful as a boiler engineer, and was a material witness to prove the saving effected by the new engines. On the other hand, it was alleged, that he had never actually seen either the old engines or the new, and was not a material witness. The taxing master disallowed Armstrong's expenses on the ground that the arbitrator had refused to examine him as a witness. There was another item of 71*l.* 14*s.* 5*d.* objected to, which was the amount paid for taking up the award to attorneys appointed

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by the arbitrator to prepare it. That sum was composed of 52*l.* 10*s.*, the arbitrator's charge, and 19*l.* 4*s.* 5*d.* the charges of the arbitrator's attorneys for preparing the award.

The master disallowed the whole of the 19*l.* 4*s.* 5*d.*, except the sum of 1*l.* 15*s.* for the stamp duty on the award.

In the plaintiff's affidavit, it was alleged, that this item was disallowed on the ground that the arbitrator was not entitled to any professional assistance in preparing the award.

A rule *nisi* having been obtained on behalf of the plaintiffs for a review of the taxation,

May 25. *Watson* showed cause. In the first place, as to the allowance of Armstrong's costs, it was for the master to determine whether he was a material witness or not. *Primâ facie*, every witness who is rejected by the judge is an immaterial witness, and ought not to be allowed for by the master. Here, the question of the saving of fuel, was a question of fact, and not one of science, and, therefore, Armstrong's scientific evidence as to what might have been saved, was quite immaterial. In the next place, the charge of 19*l.* 4*s.* 5*d.* for preparing the award, was properly disallowed. If the arbitrator could have charged that amount for his own labor, that might have been right; but the charge, as it stands, is an exorbitant one. It was not disallowed merely on the ground that the arbitrator was not entitled to professional assistance, but on the ground that the charge of fifty guineas was of itself a sufficient one. An arbitrator is not entitled to professional assistance, and there was no need of any in this case.

[In the course of the argument, the master stated, that it was the practice, when a witness was rejected at the trial, not to allow his expenses, and that he had considered the case of a witness rejected by an arbitrator, the same as that of one rejected by a judge. He further stated that he had disallowed the charge for preparing the award, on account of the large amount charged by the arbitrator for his costs.]

Atherton, in support of the rule. Unless the ground upon which the master proceeded as to each item be good, there ought to be a review of the taxation. First, as to the attendance of the witness. He attended, by counsel's advice, both at Liverpool and before the arbitrator. No doubt the objection was taken that he was not a material witness, but the master decided on the ground that, on the second occasion, the arbitrator had held him not to be material. But why should his attendance at Liverpool be disallowed, because the arbitrator held it not to be necessary afterwards?

[MAULE, J. You have the benefit of discussing the question here. The costs are allowed at the discretion of the court, but it usually exercises its discretion through the master. This is not a court of appeal from the master, but one exercising its own original jurisdic-

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tion. If you can show that Armstrong's evidence ought to have been admitted, you may do so.]

The court being understood to intimate that unless the witness be shown to have been material, the case cannot be sent back to the master, it is submitted that the witness was a proper one to be present at the trial.

[MAULE, J. It may be that a witness would be a very proper witness] as between attorney and client, but not as between party and party.

No doubt the immediate question was the amount of saving by the use of the new patent boilers; and therefore the direct testimony would be, the evidence of persons who had seen the consumption of the old and new boilers. But the knowledge of the witness, Armstrong, would enable him to show what, under ordinary circumstances, would be the saving. But whether his evidence was material or not, was the declining by the arbitrator to hear him, a sufficient reason for disallowing his costs of attendance at Liverpool, as well as before the arbitrator? There might have been a very good reason for the arbitrator declining to hear him, which would not apply to his attendance at Liverpool, because the judge might not have declined to hear him on the same ground. As to the other question, though the charge may appear extravagant, if the master disallowed the item on the ground that the arbitrator was not entitled to professional assistance, can it be contended that a lay arbitrator is not to be allowed to charge any thing at all for the professional assistance he may require? It would be hard to lay down such a rule. But as the master reports he disallowed the item on account of the amount charged for the arbitrator's costs, that part of the rule cannot be insisted upon.

JERVIS, C. J. I am of opinion that this rule ought to be discharged. Mr. Atherton now admits there is no ground for the rule with respect to the disallowance of the item in the costs of the award; because it is plain that the master disallowed the costs of preparing the award by the attorneys, on the ground that he thought the large charge of fifty guineas for the arbitrator's costs should have included the whole, and that the arbitrator himself ought to have paid his attorneys for their assistance. With respect to the expenses of the witness, it is a general rule that where a witness is rejected at a trial, his expenses are not allowed as between party and party. The witness rejected by the judge must be taken to have been inadmissible. Here the arbitrator was placed in the position of a judge, with all his incidental authority; and he has decided that the witness, if he had been tendered at the trial at Liverpool, ought to have been rejected, and we are not at liberty to go into the grounds of his decision.

MAULE, J. I am of the same opinion, and think that this rule ought to be discharged. As to the costs of the award, it seems to be a mistake to suppose that the master laid down any general rule.

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that a lay arbitrator cannot charge for employing an attorney to prepare an award; but even if he did, on a rule to review, it would be necessary to go further than the plaintiffs have done, and show that it is not a general rule, and is not applicable to this case; because, if there be a want of generality, still, if it be applicable to this case, there is no reason for reviewing the decision of the master. I do not think there is any substantial difference between what the master has reported and what was supposed to be the ground of his decision; and we cannot review a right decision because the ground of it was inadequate. As to the witness, I am disposed to think that he was not one who ought to have been allowed as between party and party. He might have been useful to advise the plaintiffs and watch the case. I concur with the Lord Chief Justice as to the rejection of the witness by the arbitrator. The chief object in referring a suit in many cases is to substitute a less accurate, but a more prompt, mode of decision; and any point of law which may arise is determined by the arbitrator, and all the legal consequences follow upon such a decision. Whether the reason be good or bad, all we can look to is the decision. The arbitrator, therefore, being a competent tribunal, has decided that the witness was not admissible, and therefore was a witness whom the plaintiffs cannot charge the defendants for bringing to the trial or the arbitration.

CRESSWELL, J. I am of the same opinion. As to the charges for preparing the award, I think the master was justified in saying, that an arbitrator who charged fifty guineas for his award, considering the amount of his labor, should not be allowed to charge for professional assistance in preparing the award. As to the witness, also, I think the decision of the arbitrator is conclusive, and his expenses ought not to be allowed.

CROWDER, J. I, also, am of the same opinion. The case was moved on the ground that the master had disallowed the costs of preparing the award upon some general rule or principle; but, after the report of the master, it is not necessary to say whether there be any general rule on the subject. As to the other point, I should not be disposed to decide that the witness was immaterial; but I think his expenses were properly disallowed, on the ground that the arbitrator must take the place of a judge in all respects; and as the rule prevails, that where a judge rejects a witness, rightfully or wrongfully, his expenses are disallowed, it must be so with regard to this witness, who was rejected by the arbitrator.

Rule discharged.

Dorrett v. Meux.

DORRETT and another v. MEUX.

May 29, 1854.

Evidence — Act Book of Ecclesiastical Court — Copy — Stamp.

Under the 14 & 15 Vict. c. 99, s. 14, an unstamped copy of an Act Book of the Ecclesiastical Court, is sufficient evidence of the probate of a will to prove the executorship of the person named in it.

EJECTMENT by remaindermen.

At the trial, before Crowder, J., the counsel for the plaintiffs, in making out their title, tendered a copy of the Act Book of the ecclesiastical court, for the purpose of proving that one Peacock had, by will, assigned a lease of the premises in question to Hitchins, his executor. The evidence was objected to, but admitted. A verdict having been found for the plaintiffs, with leave to the defendant to move to enter a nonsuit upon a number of points, of which the admission of the copy of the Act Book was one.

May 29. *Bullar* moved, accordingly. The copy of the Act Book was improperly received under the statute 14 & 15 Vict. c. 99, s. 14.

[JERVIS, C. J. Surely, it is a "book of a public nature," within the meaning of the statute, and it was put in not to prove the will, but the executorship.]

The Act Book might be evidence for that purpose, but not the copy, without proof of the loss of the original. The probate is the best copy, and there was nothing shown to account for the absence of it.

[JERVIS, C. J. There is no such thing as a best copy.]

This would lead to an evasion of the stamp laws.

JERVIS, C. J. As to the point about the Act Book. Before the statute, the book itself would have been good evidence, without proving the probate. The copy is good evidence since the statute, and does not require a stamp.

PER CURIAM.¹

Rule refused.

¹ JERVIS, C. J., MAULE, J., CRESSWELL, J., and CROWDER, J.

Coster v. Baring.

COSTER v. BARING.¹

June 12, 1854.

Evidence — Inspection of Documents.

The right of a plaintiff, under the statute 14 & 15 Vict. c. 99, to inspect deeds in the defendant's custody, (where such a right exists,) cannot be limited by what is necessary to make out a *prima facie* case; but it extends to any deeds which may tend to support or strengthen the case on the part of the plaintiff. The rule that one party has no right to inspect documents which make out the title of the other, does not apply, if they also make out his own. In an action of ejectment on title, the deeds which constitute the title of the defendant may be inspected as evidence for the plaintiff, if it appear upon the affidavits that the recitals may tend to support his case; for instance, as to pedigree: and inspection will not be refused on the mere suggestion that possibly it might be made available for the purpose of adapting the evidence to the recitals.

The plaintiff claiming as tenant in tail under the will of his great-grandfather, on the determination of successive life estates in the grandfather and father, the defendant claiming as devisee of one to whom the grandfather had conveyed the premises, inspection was granted to the plaintiff of three deeds, one by which the premises were conveyed to the testator, the great-grandfather, in fee; and one by which they were conveyed by the grandfather to the person under whom the defendant claimed; and the deed under which he claimed to have taken from that person, on an affidavit stating that the latter deed would contain recitals, showing that the grandfather took under the will of the original devisor, and a recognition of the will.

APPLICATION on the part of the plaintiff in an action of ejectment to inspect certain deeds in the possession of the defendant. The application was made upon an affidavit on the part of the plaintiffs, stating that the action was one of ejectment, and that the plaintiff claimed as tenant in tail under the will of J. Coster, who died in 1773; and the plaintiff claimed as great-grandson of one J. Coster, who by his will devised the premises to his son for life, with remainder to his grandson, with remainder to the issue of that grandson in tail. The affidavit stated that the title of the plaintiff did not accrue until 1849, when the last tenancy for life ceased. The affidavit further stated, that while J. Coster, the grandfather, was tenant for life, he conveyed the premises to one Wilson, who granted the same to Baring Wall; and that the defendant claimed the premises as devisee of Baring Wall. The affidavit then stated, that "the defendant has in his possession, power, or control, as the deponent believes, various deeds relating to the property, particularly the following deeds: A certain deed by which the premises were conveyed to J. Coster, the great-grandfather, prior to the making of his will in 1773; a deed by which the premises were conveyed by J. Coster, the grandson of the testator, to Mr. Wilson, in 1802; and a deed by which the premises were conveyed by Wilson to Baring Wall, in 1831, which said deed first mentioned would show a conveyance in fee to the said J. Coster, the great-grandfather. And this deponent believes that the said deeds secondly and thirdly mentioned, contain recitals which would show

¹ Coram JERVIS, C. J., MAULE, J., CRESSWELL, J., and CROWDER, J.

Coster v. Baring.

that J. Coster, the grandson, took an estate under the said J. Coster, the testator, and will show the recognition of the will, and that the testator, the great-grandfather, was, at the date of his will, seised in fee simple of the lands in the will mentioned. That the length of time since the death of J. Coster, the great-grandfather, seventy-six years ago, makes it difficult to prove *pernancy* of the profits by him, and that it is material and necessary for the proper prosecution of the action, that the deponent should be allowed to take copies or extracts from the said deeds; and that the deponent cannot proceed safely to trial without the information; and that, in the belief of the deponent, the said deeds will prove an estate seisin in fee of the said land in J. Coster, and the other facts necessary to be proved by the deponent to establish his title to the property sought to be recovered." The affidavit contained the usual denial that the deponent had any copies of the deeds; and upon that affidavit an order was made by Williams, J., at chambers, for the inspection of the deeds referred to. A rule had been obtained calling upon the plaintiff to show cause why this order should not be set aside, and

- Phinn*, for the defendant, now supported the rule. First, as to the deed by which property was conveyed to the testator prior to the will, its inspection cannot properly be required. What the plaintiff would have to prove would be the seisin of the testator and his possession of the premises, the will, and his title according to the pedigree, as tenant in tail. The deed in question would not be evidence for him.

[CRESSWELL, J. Why not?]

- It would not prove the seisin of the testator.

[CRESSWELL, J. It would tend to do so. The plaintiff would show there was a conveyance, purporting to be a conveyance of the lands to the testator. Then he would show that the testator made a will; that would only show that he made a will intending to deal with the property; but then the plaintiff proposes to show that the property has gone in the course prescribed by the will; that is a link in the chain of evidence. The evidence might not be sufficient in the opinion of a judge, but it might satisfy a jury.]

Secondly, as to the two deeds subsequently to the will. They are independent of the title of the plaintiff, if the plaintiff proves the seisin of the grandfather, and that the defendant is ready to admit.

[MAULE, J. These deeds tend to show that the defendant claims under the grandfather; you might not admit he did; and it might be material for him to show it; and it would be shown by secondary evidence of the deeds in your custody, by which you take under the great-grandfather.]

That would be against the rule, that a party cannot inspect deeds that make out the title of the other.

[CRESSWELL, J. He may, if they make out his own title also.¹]

¹ *Vide per* CROMPTON, J., *Scott v. Walker*, 1 Com. L. Rep. 944; s. c. 22 Eng. Rep. p. 138.

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What would be the course of proof?

[CRESSWELL, J. The plaintiff wants to show possession of the great-grandfather, the will, and devolution of the property in the way pointed out by the will. He cannot do that without showing that you are actually in possession under the tenant for life.]

The possession would make no difference. The title of the plaintiff did not accrue in 1849. It would not be material to show how the property was dealt with after the will.

[MAULE, J. It would show that the possession of the defendant during the time he has been in possession, is not in any degree inconsistent with the plaintiff's title, as he took from parties claiming under the will.]

That would not be necessary.

[MAULE, J. It would strengthen the plaintiff's case. You may test it thus, by considering whether the evidence would be sufficient for the plaintiff, supposing that the defendant called no witnesses. Now, supposing that the plaintiff proved the grandfather's will, seisin under it, and his own pedigree, the defendant might say: "There has been no possession under the will; we do not deny that the testator had a title under it, but there was no possession under it;" whereas, by the evidence the plaintiff now seeks, he would gain a much stronger case, for he would show that the possession was all along under the will.]

By showing the seisin, the will, and the death of the last tenant for life within twenty years, the plaintiff would prove his title.

[JERVIS, C. J. The testator might have sold the property after his will.]

There would be a *prima facie* case.

[MAULE, J. But you cannot limit the plaintiff to that.]

The defendant would admit that the testator died seised; and that the two tenants for life took under the will.

[JERVIS, C. J. It may be a question whether you can exclude the plaintiff from this evidence by any admissions.]

It is believed that the deeds are wanted for collateral purposes.

[CROWDER, J. It may be to establish a case of pedigree.]

It is suspected that the application is a fishing one.

[CROWDER, J. A pedigree may often be proved by recitals.]

But it is suspected that it is hoped to adapt the evidence to the recitals. It is submitted that the present application does not come within the 14 & 15 Vict. c. 99, according to the principles laid down in *Hunt v. Hewitt*, 7 Exch. 236, s. c. 14 Eng. Rep. 513; and *Sneider v. Mangino*, 7 Exch. 229, s. c. 9 Eng. Rep. 488; *Hill v. Philp*, 7 Exch. 232, s. c. 7 Eng. Rep. 591; *Pepper v. Chambers*, 7 Exch. 226, s. c. 7 Eng. Rep. 589 (as to construction of statute); et vide *Bluck v. Gompertz*, 7 Exch. 67, s. c. 6 Eng. Rep. 524, as to power at common law.¹

¹ See a case of a similar application in an action of ejectment by reversioner of leasehold premises, against a party who claimed some premises as freehold, and others as assignee of the lease; inspection granted of the lease, but not of the conveyance of the freehold, though it was sworn that the parcels would assist to make out the case of the plaintiff; *Doe d. Avery v. Langford*, 1 Bail C. Cas. 37; s. c. 10 Eng. Rep. 406.

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[CRESSWELL, J. Assuming that the deeds would tend to prove the plaintiff's title, could not he have filed a bill of discovery for their production?]

In Wigram on Discovery, the rules are laid down on that subject, but it is difficult to apply them to any particular case.¹

[JERVIS, C. J. It often happens that the recitals of deeds make out a pedigree.]

But it often happens that pedigrees are made up to suit recitals.

[MAULE, J. You rather put a case of fraud; but can that be supposed?]

The plaintiff's case is stated in his own affidavit, "that the deeds contain recitals which will show that J. Coster, the grandson, took an estate under J. Coster, the testator, and will show a recognition of the will."

[JERVIS, C. J. That may be a legitimate purpose.]

If this application is granted, any man may claim property, and have inspection of the owner's title deeds upon an affidavit that the recitals will prove his own title.

[CRESSWELL, J. He must first state what his title is, and give some reason to suppose that the deeds are in the other's custody; mere surmise will not suffice.

MAULE, J. The deeds in question go strongly to support the plaintiff's case.

CROWDER, J. You cannot confine the plaintiff to a *prima facie* case. He has a right to every thing he can get to strengthen his case.²]

Clarke, for the plaintiff, was not called upon; and

THE COURT being about to discharge the rule, a reference was proposed and assented to.³

¹ See Mr. Charles Pollock's able treatise on the law on that subject as now applied to inspection of instruments.

² Inspection of deeds in the hands of a person claiming as heir, will not be granted to a defendant on an ejectment on title, although the affidavit states they are required solely for the purpose of making out a pedigree by the recitals; *Grace v. Hussey*, 6 Ir. Jur. 243. See a recent case of inspection granted of books of defendant. *Scott v. Walker*, 1 Com. L. Rep. 940; s. c. 9 Eng. Rep. 134. See *Dorrett v. Meux*, ante, 364, as to title, determined on the common law jurisdiction to order inspection of any instrument in which defendant has an interest, and on which the action is brought. *Doe d. Child v. Roe*, 1 E. & B. 279; s. c. 16 Eng. Rep. 202. As to estoppel by recitals, *vide* as to effect of recitals, *Young v. Raincock*, 7 C. B. 310; as to effect of payment of rent, *Daintrey v. Brocklehurst*, 18 Law J. Rep. (N. S.) Exch. 57; as to evidence, *Wright v. Colls*, 8 C. B. 150; *et vide* generally, as to evidence of title, *Dorrett v. Meux*, ante 364, and cases there cited.

³ Although no formal judgment was pronounced in this case, yet, as the opinion of every member of the court was clearly expressed in favor of the application, even before counsel had been heard in support of it, and as the case, coupled with that of *Dorrett v. Meux*, may, it is believed, be useful in cases of ejectment on title, it is thought proper to report it.

Begg v. Forbes.

BEGG v. FORBES and others.

June 2, 1854.

Venue, Changing — Rules, H. T. 1853 — Effect of on Practice and Unwritten Rules.

The rule that the venue cannot be changed on the common affidavit after plea is still in force.

The new rule as to change of venue only changes the practice, in so far that the order cannot be made of course, on the common affidavit, but must be made by the court or the judge, on a rule or summons, so that it may be answered in the first instance.

Semble, that the venue cannot be changed on special grounds till after issue.

Since the Reg. Gen. H. t. 1853, r. 18, an affidavit, stating the nature of the action, and that the cause of action arose in the county into which it is sought to change the venue, and that the case can be more conveniently tried there, is not the common affidavit, but is sufficiently special to support an order for the change of the venue after plea, the pleadings being before the judge or court.

The rules of Hilary term 1853, change the practice only as to written rules, and rules by statute, or unwritten rules, remain unchanged in so far as they are not inconsistent with the new rules.

THIS was an action for a breach of the defendants' duty, as factors for the plaintiff, in the sale of indigo. The venue was laid in Middlesex. The defendants pleaded several pleas, which were delivered on the 7th of February, 1854. On the 23d of February, a summons was taken out by the defendants to change the venue from Middlesex to London, on an affidavit that the sale of indigo, out of which the action arose, took place in the city of London, and the plaintiff's cause of action, if any, arose in the city of London, and not in Middlesex, and that the cause, being of a mercantile character, might be more conveniently tried by a jury of merchants in the city of London. The plaintiff's affidavit in answer stated, that the contract was made in India, where the plaintiff resided, and that it would be disadvantageous to the plaintiff to have the action tried by a jury composed exclusively of merchants. On the hearing of the summons, Crowder, J., looked, by consent, at the pleadings, although they were not verified by affidavit, and made the order to change the venue.

Cook obtained a rule *nisi* for the plaintiff, calling on the defendants to show why the order of Crowder, J., should not be set aside, having been made, after issue, upon an affidavit which amounted only to the common affidavit.

June 2. *Byles*, Sergt., showed cause. The affidavit upon which the order of the learned judge was founded, was not the common affidavit.

[MAULE, J. It is so far short of the common affidavit, that it does not say, the cause of action did not arise in Middlesex, "or elsewhere" than in London.]

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But it states the nature of the action, and that, in the judgment of the deponent, it ought to be tried by a jury of merchants in London. The present practice depends upon the Reg. Gen. Hill. t. 16 Vict. r. 18, which directs, that "no venue shall be changed without a special order of the court or a judge, unless by consent of the parties."

[MAULE, J. That means, that the order shall not be made merely for the asking.]

De Rothschild v. Shilston, 8 Exch. Rep. 503, s. c. 20 Eng. Rep. 517, shows that the application to change the venue may be made either before or after issue; and that it is sufficient if the affidavit show that the cause of action arose in the county to which it is sought to change the venue.

[MAULE, J. The new rules do not take any notice of the existing rule of practice that the venue could be changed on the common affidavit only before plea pleaded; they begin by repealing all written rules, but they do not affect rules which are not written. The rules of 1853, show that it is necessary to look at them only for written rules, but all rules by act of parliament, or not written, remain untouched by them.]

The preamble of the rules goes further. It shows that all written rules are repealed and others substituted; and where there are no written rules, that the practice is to be as afterwards mentioned.

[MAULE, J. Before the decision in the exchequer, there was a rule of practice, that you might make application to change the venue before plea pleaded on the common affidavit. What is there in the new rules to affect that rule? Where the new rules are inconsistent with a rule formerly in existence, no doubt they repeal it; but that is not so with respect to the rule I refer to.]

The rule says, no venue shall be changed without a special order.

[MAULE, J. The meaning of the rule is, that no venue shall be changed by a common order issued as of course, and not made by a judge or the court. But, however simple or common the affidavit may be on which the order is founded, if it be made in pursuance of a summons, that makes it a special order. The rule says, the defendant shall have an opportunity of answering the application in the first instance; and it leaves untouched the practice as to the time at which the application should be made.]

The practice, at all events, is, that on application before or after plea pleaded the judge may make the order.

[MAULE, J. I cannot see how you can possibly apply before issue joined, where the object is to show that the issue cannot be fairly tried in the county where the venue is laid.]

It may be taken that the pleadings were before the learned judge who made the order; and the only ground upon which this application to set aside the order was based was, that it was made upon the common affidavit.

Cook, in support of the rule. The order was improperly made, as the affidavit was substantially only the common affidavit. In *Clulee v. Bradley*, 13 C. B. 604, s. c. 24 Eng. Rep. 357, there was a common

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affidavit with the addition of the allegation that the witnesses resided in the county into which it was sought to change the venue.

[MAULE, J. This affidavit shows the nature of the action, that it was of a mercantile kind, and that it might be more conveniently tried in London. That is exactly the sort of allegation the absence of which was relied on in the case cited.]

But the affidavit should have been more specific. In *Thornhill v. Oastler*, 7 Scott, 272, the court refused to change the venue on the ground of the expense of taking the witnesses to the county where it was laid, because the affidavit was not sufficiently specific.

[MAULE, J. This application is not made merely on the ground that the cause of action arose in London, but also on the ground that the case may be more conveniently tried there. The question is, whether that sufficiently appears on the affidavit.]

There is an affidavit contradicting it.

[MAULE, J. That is not so. The plaintiff only alleges that it would be a disadvantage to him if the case were tried by a jury of London merchants, thereby implying that he would wish it to be tried by persons who knew the least about such matters.]

JERVIS, C. J. The rule was granted upon the ground that the order of the learned judge had been made upon the common affidavit; but it turns out that it was not the common affidavit.

PER CURIAM.¹

Rule discharged, with costs.

WILKINSON v. KIRBY.

June 14, 1854.

Trespass for Mesne Profits — Judgment by Default in Ejectment — Estoppel — Pleading — Distributive Plea — Common Law Procedure Act.

Trespass for mesne profits; pleas, first, not possessed; secondly, that before the said times when, &c., W. was seised in fee, and demised for twenty-one years to T., who demised to the defendant, who entered by virtue of the demise. Replication, by way of estoppel, as to trespasses since the 26th of October, 1853, setting out a writ in ejectment, in which the plaintiff was claimant, and dated the 26th of October, 1853, directed to the defendant as the tenant in possession. Averment of judgment thereon by default, and entry by the plaintiff by virtue of the judgment:—

Held, on demurrer, a good replication to both pleas: and that it was not necessary to aver

¹ JERVIS, C. J., CRESSWELL, J., and CROWDER, J.

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notice of the proceedings in ejectment to the defendant, or that a writ of possession was issued or executed; and that entry by the plaintiff, if necessary, was sufficiently averred:—

Held, also, that the estoppel was from the date of the writ, and that the plaintiff's title would be presumed to continue until, by rejoinder, it was shown to have determined.

Seemle; that section 75 of the Common Law Procedure Act applies to affirmative pleadings in answer to the action, and not to pleadings by way of denial of the cause of action.

THE declaration stated that the defendant broke and entered the plaintiff's house, and continued therein, and detained the same from the plaintiff for a long space of time, whereby the plaintiff was during all such time deprived of the use and enjoyment thereof, and was put to great expense in recovering the possession of the said house, and otherwise.

Third plea, that the said house was not at the said several times when, &c., or any of them, the house of the plaintiff *modo et formâ*. Fourth plea, that before the said several times when, &c., one George Wilkinson was seised in his demesne as of fee of the said house, and being so thereof seised afterwards, and before the said several times when, &c., and each of them, to wit, on the 27th of December, 1846, by a certain indenture then made between the said G. Wilkinson of the one part, and H. P. Thomas of the other part, which said indenture was sealed with the seal of the said G. Wilkinson and with the seal of the said H. P. Thomas, the said G. Wilkinson did demise and lease unto the said H. P. Thomas the said house, from the 29th of September then last past, for the full end and term of twenty-one years thence next ensuing, and fully to be completed and ended. By virtue of which said demise the said H. P. Thomas afterwards, and before any of the said times when, &c., entered into and upon the said house, and became and was possessed thereof for the said term so to her thereof granted as aforesaid; and that afterwards, and while the said H. P. Thomas was so possessed as aforesaid, and before the expiration of the said term so to her granted as aforesaid, and before any of the said times when, &c., to wit, on the 23th of January, 1847, the said H. P. Thomas demised the said house to the defendant, to have and to hold the same to the defendant, from the 25th of March next after the day and year last aforesaid, for the term of one year then next following, and fully to be completed and ended, and so from year to year for so long a time as the said H. P. Thomas and the defendant should respectively please; by virtue of which said last-mentioned demise the defendant afterwards, and before any of the said times when, &c., in the said count mentioned, and before the expiration of the said term so to the said H. P. Thomas granted as aforesaid, entered into and upon the said house, and became and was possessed thereof for and during and upon the tenancy so created as last aforesaid; and that afterwards, by virtue of the tenancy so created as last aforesaid, the defendant did at the said several times when, &c., and before the expiration or determination of the term to the said H. P. Thomas granted as aforesaid, and before the expiration or determination of the said tenancy of the defendant, and during the continuance thereof, enter into and upon the said house in and upon the plaintiff's alleged possession thereof, as she

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lawfully might for the cause aforesaid; and because the said term so to the said H. P. Thomas granted as aforesaid, and the said tenancy of the defendant had not been determined or ended, but continued and was in full force and effect at and during all the times in the said count mentioned, the defendant did at and during all those times continue in the said house, and detain the same from the plaintiff as she lawfully might for the cause aforesaid. And the defendant says, that the said several trespasses and wrongs in this plea mentioned and justified are the several trespasses and wrongs in the said count mentioned.

Replication as to so much of the third and fourth pleas as relates to the trespasses complained of in the declaration, since the 26th of October, 1853, that the defendant ought not to be admitted to plead the said third and fourth pleas, or either of them, as to the said trespasses complained of since such time, because that, on the day and year last aforesaid, for the purpose of the plaintiff recovering the possession of the said house, a writ of our lady the queen, issued forth of the Court of Common Pleas, at Westminster, in these words, that is to say: [The writ was then set forth, and was dated the 26th of October, 1853, and directed to H. P. Thomas and the defendant, and to all entitled to defend possession; and stated that the plaintiff claimed to be entitled to the house, and that, if they did not appear to defend within sixteen days, judgment would be signed, and they turned out of possession.] Averment, that the defendant mentioned in the writ was, at the time of the issuing of this writ, the tenant in possession; that no appearance was entered or defence made to the writ; and that after the issuing of the writ, and whilst the action of ejectment thereby commenced was pending in the Court of Common Pleas, and in pursuance of the act of parliament in that behalf, such proceedings were thereupon had in the Court of Common Pleas, at Westminster, in such action of ejectment, that afterwards and before the commencement of this suit, the plaintiff, by the consideration and judgment of the court, recovered possession of the said house, with the appurtenances, as by the record and proceedings thereof still remaining in the said Court of Common Pleas more fully and at large appears, which said judgment is still in full force and effect; and that afterwards and before the commencement of this suit, and by virtue of the said judgment, the plaintiff entered into and upon the possession of the said house, with the appurtenances, and became and was thereof possessed; wherefore the plaintiff prays judgment if the defendant ought to be admitted against the said recovery, record, and proceedings to plead the said third and fourth pleas, or either of them, as to the trespasses complained of since the said 26th of October, 1853.

Demurrer and joinder.

Deighton, in support of the demurrer. The replication is bad. To entitle the plaintiff to maintain trespass, it is necessary to show not merely a title to possession, but actual possession. The record here shows only a title to possession on and after the 26th of October.

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[JERVIS, C. J. This court decided in *Matthew v. Osborne*, 22 Law J. Rep. (N. S.) C. P. 241; s. c. 20 Eng. Rep. 238, that in an action for mesne profits, to a plea of not possessed the plaintiff may reply, by way of estoppel, a judgment in ejectment in his favor. So, also, it was held in *Doe v. Wright*, 10 Ad. & E. 763.]

But in *Doe v. Wellsman*, 2 Exch. Rep. 368, it was made a question whether a judgment by default against the casual ejector could be so replied. In the old form of proceedings in ejectment, an entry was alleged in the declaration; then the entry was taken to be by virtue of the writ of possession, which had relation back to the date of the demise. But here the judgment was by default: it does not appear that the defendant had notice of the writ or proceedings, and no writ of possession is shown by the record.

[MAULE, J. A recovery in ejectment and entry under it, are pleaded by way of estoppel. You contend that the replication ought to contain nothing but matter of record.]

Yes; an estoppel on matter of title must be by matter of record. Co. Litt. 252, a. The entry here is not matter of record; and being the act of one party only, it is not good by way of estoppel *in pais*.

[CROWDER, J. Suppose the replication had stopped at the allegation of judgment recovered?]

That alone would not have shown sufficient possession: it is necessary, in addition, that there should be a writ of possession executed. Buller's N. P. 87. So, in *Aslin v. Parkin*, 2 Burr. 665, it is said, when the judgment is against the casual ejector, the lessor shall not maintain trespass without an actual entry; and, therefore, he ought to prove the writ of possession executed.

[JERVIS, C. J. If the defendant here, after the action of ejectment, had refused to quit the premises, then a writ of possession would have issued to turn her out, and there would have been, you admit, a good estoppel. But, instead of refusing to go out, she acquiesces in the judgment, and goes out; it ought to be, therefore, all the more an estoppel. In *Doe v. Huddart*, 2 Cr. M. & R. 316, it was assumed that the judgment by default against the casual ejector would have been a good estoppel, if pleaded.]

A writ of possession, in that case, was executed. *Smartle v. Williams*, 1 Salk. 245, and *Litchfield v. Ready*, 5 Exch. Rep. 939; s. c. 1 Eng. Rep. 460, are authorities that an entry must be shown, either as a matter of record, or as a matter of fact; and if the latter, then it is traversable.

[MAULE, J. The defendant is not estopped from denying the matter of estoppel; she can deny the record by rejoining *nul tiel record*, and can also traverse the entry if she pleases.]

It must be contended, by the plaintiff, that in any case where a plaintiff can maintain ejectment, he may also maintain trespass against any one in possession, whether defendant in the ejectment or not; but *Jefferies v. Dyson*, 2 Str. 960, shows that that is not so. Secondly, from what time is the judgment an estoppel?

[JERVIS, C. J. From the 26th of October, the date of the writ.]

Thirdly, for how long is it an estoppel? It cannot be an estoppel

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for more than the time between the date of the writ and the entry by the plaintiff, for *non constat*, but the plaintiff then parted with his possession to the defendant. Then, *Doe v. Wellsman* shows that if the replication does not show an estoppel for the whole period comprised in the declaration, and to which the plea is pleaded, it is bad.

[MAULE, J. Is not the plea entire; and if the defendant is estopped as to a portion of the time, is she not estopped as to the whole?]

Section 75 of the Common Law Procedure Act applies, and the plea is to be construed distributively, and it would be found partly for the plaintiff and partly for the defendant.

[CRESSWELL, J. That section would seem to apply only to pleas that answer the action, that confess and void; not to pleas of denial.

JERVIS, C. J. It would apply to such cases as *Tuck v. Tuck*, 5 Mee. & W. 109, and *Cousens v. Paddon*, 2 Cr. M. & R. 547.]

As to the replication to the fourth plea, it is bad for the reasons already urged; and, also, for that it is confined to particular trespasses, to which the plea is not pleaded. The plea is only pleaded to trespasses justifiable under the demise therein alleged, and the plaintiff ought, therefore, to have new assigned. *Greene v. Jones*, 1 Wms. Saund. 299, n. 6; and *Scott v. Dixon*, 2 Wils. 3.

Prentice, for the plaintiff. As to the point that the estoppel is alleged for too long a time, the replication follows the precedents, and the judgment in ejectment has always been held an estoppel from the date of the demise till the date of the trespasses. *Doe v. Wright*, and *Doe v. Huddart*. Even if the replication be deficient in not alleging the plaintiff's possession from the 26th of October to the commencement of this suit, it is sufficient to answer the plea if it shows an estoppel during any portion of the time: for the plea is in bar, and to be good at all it must be good altogether; and if bad in part, it is bad altogether. Section 75 of the Common Law Procedure Act does not affect that rule of pleading. There is no hardship upon the defendant, for if a state of facts has arisen which prevents the facts stated in the replication operating as an estoppel, that state of facts may be rejoined. Also, when once it is shown that the plaintiff was entitled to possession by virtue of the judgment, that title to possession must be presumed to continue till the rejoinder shows the contrary. As to a judgment by default in ejectment being an estoppel, in *Armstrong v. Norton*, 2 Irish Law Rep. 96, it was held to be an estoppel in evidence, though not pleaded, and if pleaded, there can be no doubt that it is an estoppel. Even if there were any doubt before the Common Law Procedure Act, there can be none since, for the fiction that formerly prevailed is done away with now, and by sections 168 and 169, the plaintiff and the defendant are both parties to the action, and both are named in the writ. Then, it is said that this cannot be an estoppel, because no entry appearing by matter of record is alleged. But that is not necessary; an entry under the judgment is alleged, and the defendant is not estopped from denying the facts which constitute the estoppel, but only from saying the plaintiff is not possessed. But it is questionable whether any allega-

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tion of entry was necessary, especially with reference to the fourth plea, for that plea is bad if the plaintiff was entitled to possession for any portion of the time covered by the plea, and the defendant's alleged title is inconsistent with a recovery in ejectment by the plaintiff. And with reference to the plea of not possessed, it was not necessary to aver an entry, for *Jones v. Chapman*, 18 Law J. Rep. (N. S.) Exch. 456, shows that a plea of not possessed, means that as against the defendant the plaintiff has no title.

Deighton, in reply.

JERVIS, C. J. I am of opinion that the replication is good, and our judgment ought to be for the plaintiff. The plaintiff declares in trespass for mesne profits, and complains that the defendant kept him out of possession. The first plea to which the replication is pleaded, is the third — not possessed. That plea raises two classes of defence: it either denies a possession in fact, which is necessary to support an action for trespass, or it asserts a title in the defendant or in a third party. After long discussion that point was settled by the decision in *Jones v. Chapman*. The defendant, therefore, by her plea, professes to say the plaintiff is not possessed at all, or that the title is in somebody else. To this the plaintiff replies, not "I am possessed," or "that neither the defendant nor any third party has title," but that the defendant ought not to be allowed to say either the one or the other, because there has been an adjudication on the matter, there having been an action between the plaintiff and the defendant, and a judgment therein, determining that the plaintiff had possession and title. To this the defendant objects, that a judgment by default has not that effect; but it was decided in the case of *Aslin v. Parkin*, that a judgment in ejectment followed by a writ of possession, though not pleaded, is evidence of the plaintiff's title and possession, against the tenant in possession, from the date of the demise in the declaration in ejectment; and it is now well settled that if pleaded, and properly pleaded, it is an estoppel. It is said that this is only so when the judgment is followed by a writ of possession. But an entry in fact is as good as a writ of possession executed, and an entry in fact is alleged here, and sufficiently alleged, and it is a mistake to say that matters of fact may not be pleaded by way of estoppel. The question is not whether the defendant is estopped from denying these matters of fact; she may do that if she pleases; but whether, if she admits them, (as she does by her demurrer,) she is estopped from denying the plaintiff's possession. But I question whether, as regards the third plea, any allegation of entry was necessary. Under that plea the defendant might prove title in a third party during the whole time covered by the declaration; but it is clear that the plaintiff was entitled to possession for a portion of the time, namely, from the 26th of October till the entry; the judgment in the action of ejectment determined that, and the defendant, therefore, could not plead this plea to the full extent, and, therefore, she cannot plead it at all. Then, it is said that the plea is distributive, and that the plaintiff should

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aver to what portion of the time the estoppel is replied ; but I apprehend that title and possession are both traversable, and they are presumed to continue until the contrary is shown ; and as the replication shows a title in the plaintiff, by matter of record, from the 26th of October till his entry, his title must be presumed to have continued till the present suit. If, indeed, there be circumstances which prevent the judgment being an estoppel since the entry, such as are suggested, namely, a subsequent demise to the defendant, the defendant may rejoin these facts ; but she cannot be allowed, upon the present pleadings, to admit the judgment and deny the continuance of the plaintiff's title. Then it is further said, that since the Common Law Procedure Act, s. 75, the pleas can be taken distributively ; but I think the object of the framers of that act was to meet more especially such cases as *Cousens v. Paddon* and *Tuck v. Tuck*, in which a difficulty arose about entering the verdict where payment and set-off were not pleaded to specific sums. The section does not say that the principle of pleading is to be altered, according to which it is held that a plea which is bad in part is bad altogether ; the record is still to be taken as a whole record ; and the meaning of the section is, that when, at the trial, the facts can be taken distributively, they are so to be taken. And there is no injustice in that here. The defendant says : " You are not possessed, for somebody else is entitled ; " the plaintiff says : " You are not at liberty to say that, for there has been a judgment on that point in my favor. " If any circumstances since the judgment have occurred to alter the title, the defendant can rejoin them. The same observations apply to the fourth plea, which sets up a term from the 29th of September, 1846, for twenty-one years, from the plaintiff to one Thomas, who, on the 28th of January, 1847, demised to the defendant, from the 25th of March, 1847. That cannot have existed consistently with the recovery in ejectment. For these reasons, I think that the replication is good to both pleas, and that our judgment should be for the plaintiff.

MAULE, J. I am of the same opinion. The replication does not show the title of the plaintiff, but only that the defendant is not entitled to plead those pleas. That is the province of a replication by way of estoppel ; and if it shows other matter, provided that other matter is not inconsistent with the matter of estoppel, it is not the less a good replication by way of estoppel. The replication comes to this : the defendant says in her plea, that the plaintiff was not so possessed as to entitle him to bring this action for mesne profits. The plaintiff replies : " You are not entitled to say that, even if it be true, because there has been an action of ejectment between us, in which I recovered judgment. " That is the highest kind of estoppel, and it amounts to an allegation, that in proceedings of ejectment had between the plaintiff and the defendant, they being both named in the writ, it was decided by a competent tribunal that the plaintiff was entitled to possession from the 26th of October, 1846. That is inconsistent with the defendant's plea of not possessed, and is a perfectly good estoppel, if that be the effect of it. The difference that

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formerly existed between actions of ejectment and other actions no longer exists. The Common Law Procedure Act has put them all in the same position, and the point of the plaintiff's possession having been determined in an action of ejectment, the result is the same as if it had been determined in any other form of action. But the defendant says, that the plea is distributive; that it is as if she had pleaded a number of pleas, one applying to the time before, another to the time after the entry by the plaintiff; and that in that case the replication ought to have been confined to the former only of those pleas, and that, if so, it ought to be confined to a portion of the time now. But that is not so; the plea is pleaded to the whole time as one plea. If it be shown that the defendant is estopped from pleading it to any portion of the time, she is estopped from pleading it at all. Now, it cannot be denied that the defendant is estopped as to some portion of the time, and she is, therefore, not at liberty to plead her plea to the whole, and the replication is good. If the replication, indeed, had been pleaded to trespasses before the 26th of October, it might have been defective, but it is not so pleaded. The answer to the defendant's objection is, that the allegation that there was a recovery in ejectment shows the plaintiff's title conclusively on the 26th of October; he is not bound to aver that that state of things continued; it will be presumed that it did; and if it did not, it would be for the defendant to say so in his rejoinder. But if this be doubtful, still it is only matter of special demurrer. The replication does not tend to embarrass the defendant, and I think it is sufficient as to both pleas.

CRESSWELL, J. I am of the same opinion. It cannot be contended now, that in an action for mesne profits a recovery in ejectment is not a good plea by way of estoppel. That matter has been settled by the decision in *Doe v. Wright*. Then, is it well pleaded here, by way of replication, to the whole plea, or is it bad as applying only to part? It is said, that it could not be an answer to the whole plea, because, admitting it showed the plaintiff possessed up to the time of entry, it did not show his possession longer, namely, at the date of the trespass complained of, and *Doe v. Wellsman* was cited to prove that if so the replication was bad. But in that case the declaration covered a time from December, 1844, to March 1846; the defendant pleaded that the close was not the plaintiff's, and the plaintiff replied, by way of estoppel, a recovery by the plaintiff against the casual ejector on a demise in October, 1845. This was no answer to the period between December, 1844, and October, 1845, and professing to be a replication to the whole time embraced by the plea, and being an answer as to part only, the court held it to be bad. Here, if the plea is to be construed distributively, there are strong reasons for saying that the defendant ought herself to have so construed it, and not laid herself open to this replication; but the better answer to the defendant's objection is, that there is nothing to show that the replication does not cover the whole period.

CROWDER, J. I am of the same opinion. One point relied on by

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the defendant was, that a judgment by default in an action of ejectment was not a good estoppel. But however this might have been before the Common Law Procedure Act, sections 168 and 169 do away with the objection, and a judgment by default for the claimant in an action of ejectment may be pleaded by way of estoppel against the defendant as a judgment by default in any other form of action. If so, the question is, whether the replication is good as to both the pleas. I think it is. As to the plea of not possessed, it is said that the plea is distributive, and that it does not appear that the estoppel applies to any period subsequent to the entry of the plaintiff. But I think the answer is, that the plaintiff's title, established by the recovery in ejectment, must be presumed to have continued till the contrary is shown, and that it was for the defendant to show that by her rejoinder.

Judgment for the plaintiff.

SIM v. EDMONDS.

May 31, 1854.

Practice and Procedure — Pleading — Profert and Oyer.

Action on an award; plea, setting out the award and concluding with a demurrer to the declaration:—

Held, that by section 56, of the 15 & 16 Vict. c. 76, the award was part of the plea and not of the declaration, so as to enable the defendant to demur; and judgment was given for the plaintiff.

Semble, that the defendant ought to have set the award out in his plea with or without a prayer of judgment, so as to enable the plaintiff either to traverse and raise any question of fact, as to its being the award declared on, or to demur and raise any question of law, as to its construction.

DECLARATION on an award, assigning for breach, the non-payment, by the defendant, of the sum awarded.

Plea, setting out the award *verbatim*, and concluding in the form of a demurrer, "that the declaration is not sufficient in substance." Joinder in demurrer.

Lloyd, in support of the demurrer. The award set out in the plea must be taken to be upon the record, and to be the award referred to in the declaration.

[JERVIS, C. J. By the 15 & 16 Vict. c. 76, s. 55, *profert* is no longer necessary; and by section 56, if a document is set out, it is to be taken as part of the pleading in which it is set out. The award is, therefore, part of your plea; but the demurrer is to the declaration, and you can only demur to that for matter in it.]

This is the only way in which the defendant can have the advantage of taking the opinion of the court on the law without going to trial on a useless issue of fact.

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[JERVIS, C. J. I apprehend the object of the act was to put all documents on the same footing. Is there any instance of a document of which *profert* need not be made at common law being set out, and then a demurrer to the previous pleading?]

In *Jeffery v. White*, 2 Doug. 475, the action was trespass, and plea damage feasant; the replication set out a private act of parliament without *profert*, and the defendant craved oyer and demurred. The act was held to be on the record as part of the rejoinder on the argument of the demurrer, although the defendant was not entitled to oyer.

[JERVIS, C. J. The defendant there craved oyer, and the plaintiff acceded to his demand, although he need not have done so; and it must be taken that the defendant was satisfied that the act was truly set out. But what is there to show that the award is truly set out in the plea in this case? The plaintiff has no opportunity of putting that in issue.]

He might either join in demurrer, or traverse.

[JERVIS, C. J. If the plaintiff had not joined in demurrer, the defendant would have signed judgment.

MAULE, J. Unless prayer of judgment is prohibited, the defendant ought to have pleaded the award and prayed judgment if the plaintiff could maintain his action. Or if it is prohibited, he ought to have pleaded the award simply (as there would have been then a tacit prayer of judgment,) and not demurred. Then the plaintiff could have either traversed the award as pleaded or demurred to the plea. The defendant, by demurring, admits the award to be as declared on.]

PER CURIAM.¹ The defendant may amend on payment of costs, otherwise there must be

Judgment for the plaintiff.

The defendant accordingly elected to amend.

¹ JERVIS, C. J., MAULE, J., and CROWDER, J.

C A S E S

ARGUED AND DETERMINED

IN THE

COURT OF EXCHEQUER;

AND UPON

WRITS OF ERROR FROM THAT COURT TO THE EXCHEQUER CHAMBER,

DURING THE YEAR 1854.

GUEST v. WARREN.

January 16, 1854.

Res Judicata — False Imprisonment — Charge of Felony.

To an action for falsely, maliciously, and without any reasonable or probable cause, charging the plaintiff with larceny, before a justice of the peace, indicting the plaintiff, and causing him to be tried on such charge, on which he was afterwards acquitted; the defendant pleaded, that before the commencement of the suit, the plaintiff brought an action of trespass against the defendant for assaulting and imprisoning him on a false and unreasonable assertion, that he had committed felony; that to that action the defendant pleaded the general issue, and a justification of the assertion, and imprisonment in consequence thereof; on trial of which action the judge directed the jury to take into their consideration the question whether the defendant had charged and accused the plaintiff with having stolen the goods mentioned in the declaration, and falsely and maliciously, and without any reasonable or probable cause, committed the grievances complained of in the present action; that the jury found for the plaintiff and assessed damages accordingly, and that the plaintiff recovered judgment for the same, with costs; averring the identity of the imprisonments in the two actions, and that the grievances complained of were the same with those in respect of which damages had been given on the former occasion:—

Held, first, that this plea was no answer to the action.

Secondly, that the judge had misdirected the jury on the trial of the former action.

Quære, whether it would have been a defence, that on the trial of the former action, damages in respect of the cause of action complained of in the present had been assessed by the jury with the consent of the parties?

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THE declaration alleged that the defendant falsely and maliciously, and without any reasonable or probable cause, charged the plaintiff before a justice of the peace with having feloniously stolen certain goods and chattels of the defendant, and caused and procured him to be committed to prison on that charge, and after several remands to be committed for trial at the central criminal court; that the defendant afterwards went before that court and falsely, maliciously, and without any reasonable or probable cause, indicted the plaintiff on that charge; on which indictment he was afterwards tried and acquitted, &c.

To this declaration the defendant pleaded, that before the commencement of the present action, the plaintiff impleaded the defendant in an action of trespass for assaulting, seizing, and laying hold of him, and forcing and compelling him to go, and causing him to be forcibly conveyed in custody along divers public streets and highways, to a police station, and there imprisoned and kept him in prison for a long time, and at the expiration thereof caused and compelled him to go and to be forcibly conveyed in custody to a police office, and there imprisoned him, contrary to law, upon a false and unreasonable assertion that he had committed an offence punishable by law, to wit, felony; that the defendant in answer to that action pleaded the general issue, and a plea justifying the said assertion as true, and that thereupon and for that reason he gave the plaintiff in charge to a police constable, and did commit the alleged trespass, in order to take the plaintiff before a justice of the peace, there to be dealt with according to law, the said trespass being necessary for that purpose; to which pleas the plaintiff pleaded respectively by joining issue and replying *de injuriâ*, on which also issue was joined; that that cause was afterwards tried, on which occasion the judge directed the jury to take into their consideration the question whether the defendant had charged and accused the plaintiff with having feloniously stolen, taken, and carried away the goods and chattels in the declaration, and falsely, and maliciously, and without any reasonable or probable cause, had made the said charge and committed the grievances complained of in the present action; and the jury found the defendant guilty of the said trespasses, and that the same had been committed by him of his own wrong, &c., and assessed the damages accordingly; for which the plaintiff afterwards recovered judgment, with costs. The plea then averred that the imprisonments mentioned in the declaration in the present action were the same imprisonments as those complained of in the former action, and that the grievances complained of by the plaintiff were directed by the judge to be taken into consideration by the jury on that occasion, and were taken into consideration by them, and were the same in respect of which damages were given by them. To this plea the plaintiff demurred.

Macnamara, in support of the demurrer. This is a plea of judgment recovered on a former occasion. But the former action was wholly unlike the present, and if damages for the grievances now

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complained of were awarded by the jury in the former action, they were awarded erroneously.

[PARKE, B. The taking a man up on a charge of felony, going before a grand-jury, and taking an oath to induce them to find a bill against him, and then going before a petty jury and inducing them to find him guilty, is a very different thing from merely imputing felony to him.]

The court then called on

Piggott, in support of the plea. Admitting that the two actions are different, and that, in strictness, damages ought not to have been given by the former jury for the grievances here complained of, the plaintiff, by signing judgment on that verdict, and taking those damages, has acquiesced in their act. The case is the same as if both parties had agreed that the question respecting those damages should be left to the jury, and they had found accordingly.

THE COURT said the plea was no answer to the action. It might, indeed, be otherwise if it had shown that on the trial of the former action the damages sought to be recovered in the present had been brought before the jury with the consent of the parties. But in the absence of that consent, the judge having directed the jury to take them into consideration was a misdirection. On the trial of the present case, the defendant might urge to the jury the fact that damages for the cause of action had already been given.

*Judgment for the plaintiff.*¹

¹ It is universally agreed that a former recovery, in order to be a bar must be for the same identical cause of action, between the same identical parties, and must have been decided on the merits. A common test in determining whether the former action was for the same cause, has been, whether the action would be supported by, and would necessarily require, exactly the same evidence. And it has been held that unless the point involved in the second case, was *directly* and *necessarily* involved

in the first suit, a judgment in the former is no bar to a recovery in the latter. Some of the best discussions of the law of former recovery may be found in *King v. Chace*, 15 New H. R. 9; *Towne v. Simms*, 5 New H. R. 259; *Burdick v. Post*, 12 Barbour, 168; *McKnight v. Dunlop*, 4 Barbour, 36; *Gates v. Gorham*, 5 Vermont, 317; *Shafer v. Stonebreaker*, 4 Gill & Johns. 345; *Kirkpatrick v. Stingby*, 2 Carter, 269

Creed v. Fisher.

CREED v. FISHER.

January 20, and 31, 1854.

Excessive Damages — Special Jury — Challenge.

The court will not disturb a verdict merely on the ground that they would not, in their private judgment, have given such large damages as were given by the jury. They must be satisfied that the jury in awarding those damages either were actuated by some improper motive, or proceeded on some erroneous principle of assessment.

No right of peremptory challenge exists in the case of a special jury, appointed according to the provisions of the Common Law Procedure Act, 15 & 16 Vict. c. 76, ss. 105, 108.

THIS was an action for assault and battery, brought by a churchwarden against a clergyman of the Church of England, which was tried before Talfourd, J., and a special jury, appointed according to the provisions of the Common Law Procedure Act. The case was one which, from its nature, excited much local feeling in the neighborhood where it was tried; and when called on for trial, after several of the jurymen had answered to their names, the counsel for the defendant objected to one of them, on the ground that, being a member of the Society of Friends, he ought not to act as jurymen in a case where the conduct of a clergyman of the Church of England was the matter in question. The judge considered this a peremptory challenge, and held that no right of peremptory challenge existed in case of a special jury appointed under that statute, but the juror was by consent withdrawn from the box. The case then proceeded, and the jury found for the plaintiff, damages 300*l*. The judge reported that the damages were larger than he thought they ought to have been, but that the assault, though not unprovoked, was nevertheless a severe one, and he could not say that, in awarding that amount of damages, the jury exceeded their province.

Slade, in Michaelmas term, obtained a rule for a new trial, on the grounds, first, that the challenge ought to have been allowed; and, secondly, that the damages were excessive.

On this rule coming on for argument, on the 20th January, the court — consisting of POLLOCK, C. B., PARKE, B., ALDERSON, B., and MARTIN, B. — having intimated an impression against the challenge, called on

Slade, *Mowbray*, and *Coleridge*, in support of the rule on that point. A change in the constitution of special juries has been effected by the Common Law Procedure Act, 15 & 16 Vict. c. 76, which, after abolishing the old jury process, enacts in its 105th section, that “the precept issued by the judges of assize to the sheriff to summon jurors for the assizes, shall direct that the jurors be summoned for the trial of all issues, whether civil or criminal, which may come on for trial

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at the assizes; and the jurors shall thereupon be summoned in like manner as at present." And by section 108: "The precept issued by the judges of assize, as aforesaid, shall direct the sheriff to summon a sufficient number of special jurymen, to be mentioned therein, not exceeding forty-eight in all, to try the special jury causes at the assizes; and the persons summoned in pursuance of such precept shall be the jury for trying the special jury causes at the assizes, subject to such right of challenge as the parties are now by law entitled to, and a printed panel of the special jurors so summoned shall be made, kept, delivered, and annexed to the Nisi Prius record, in like time and manner, and upon the same terms as hereinbefore provided with reference to the panel of common jurors; and upon the trial, the special jury be ballotted for, and called in the order in which they shall be drawn from the box, in the same manner as common jurors: provided that the court or a judge, in such case as they or he may think fit, may order that a special jury be struck according to the present practice, and such order shall be a sufficient warrant for striking such special jury, and making a panel thereof for the trial of the particular cause." Under the old practice of striking special juries, a list of forty-eight names was drawn up, off which each party struck twelve. They are deprived of this advantage by the recent statute, and in cases like the present, where much local feeling is excited, great mischief might result if the parties had no right of objecting to jurymen on reasonable grounds.

[PARKE, B. The Common Law Procedure Act put special and common juries on the same footing as to the right of challenge. With respect to the latter, the rule of law is, that no peremptory challenge is allowable, except in treason and felony; in every other case, you must challenge for cause. In practice, however, and by the courtesy of the bar, challenges are often allowed in misdemeanors and civil cases tried by common juries, and probably the bar will now exhibit the same courtesy in cases tried by special juries. In some counties there are not above twenty or thirty persons on the special jury panel, and a right of challenge would consequently prevent there being any jury at all.

ALDERSON, B. There was no right of challenge to the old special jury, because the parties had the right to attend and strike off a certain number of names; if a party did not do so, he missed his opportunity of objecting.]

Crowder and Collier, showed cause. The reduction of the special jury-list under the old practice, was the act of the law rather than of the parties; for if they did not attend, or refused to strike names off, the officer did it. The statute expressly reserves power to the court or a judge to allow the old practice to be resorted to on proper occasions — a power which would, doubtless, be exercised in any case where the prevalence of local excitement rendered the right of challenge advisable.

The question of damages was then discussed, the plaintiff's counsel contending that to disturb the verdict on that ground would be an

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improper interference by the court with the province of the jury ; and the defendant's counsel urging that if parties were now deprived of all voice in the selection of special juries, the courts ought to examine with more strictness than formerly the verdicts of such juries.

THE COURT said they were clearly of opinion that there was no pretence for the challenge. On the other point, they would take time to consider.

Cur. adv. vult.

The judgment of the court was delivered on the 31st January, by

POLLOCK, C. B. We are all of us of opinion that the rule in this case should be discharged. We should not, indeed, in our own private judgment, have given such damages as were here given by the jury ; but that fact alone is not sufficient to show us that the jury, in giving those damages, must have been actuated by some improper motive, or proceeded on some erroneous principle of assessment. To assess damages, is the function of the jury, and the court ought not to disturb a verdict on the ground of their being excessive unless under one of the two states of circumstances I have mentioned.

*Rule discharged.*¹

IN THE EXCHEQUER CHAMBER.

GILPIN v. FOWLER.²

February 9, 1854.

*Libel — Privileged Communication — Malice — Question for Jury —
Rector of Parish — Schoolmaster.*

In an action for libel, where the judge has decided that the occasion of publication was justifiable, so as to render the alleged libel a privileged communication, the plaintiff, without offering any fresh evidence, is entitled to have the libel itself submitted to the jury, in order that they may say whether it does not on the face of it show express malice.

In an action for libelling the plaintiff, in the way of his business of schoolmaster, the evidence was, *inter alia*, that the plaintiff, having been for twenty years schoolmaster at the National school of the adjoining parishes of C. and I., of which the defendant, the rector of C., and another person, the vicar of I., were trustees, was requested by the defendant to undertake the Sunday school of his parish, and declined to do so. The plaintiff was then removed from the mastership of the National school, and set up a school, to gain a

¹ In one of the earliest cases in the books on the subject of granting new trials, *Wood v. Gunston*, Mich. 1655, Styl. 466, Glyn, C. J., said that the discretion of the court to grant a new trial, must be a judicial and not an arbitrary discretion.

² Before MAULE, J., WIGHTMAN, J., CRESSWELL, J., ERLE, J., WILLIAMS, J., and TALFOURD, J.

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liveliness by it, in the defendant's parish, in a school-room used as a dissenting chapel. In a letter addressed to his parishioners, (set out in the bill of exceptions,) the defendant told them that the plaintiff's attempt betrayed a spirit of opposition to authority, and justified the managers of the National school in removing him; that "no rightly-disposed Christian, who received in simple faith the teaching of inspiration, 'Obey them who have the rule over you, and submit yourselves,' could expect God's blessing to rest upon such an undertaking," and warned them against countenancing it, either by subscriptions or sending their children to it for instruction; that it would be a schismatical school, and those who aided the plaintiff in any way would be partakers with him in his evil deeds; they were to mark them which cause divisions and offences, and avoid them, &c. POLLOCK, C. B., directed the jury that the several matters given in evidence were not sufficient to justify them in finding a verdict for the plaintiff, but showed that the paper published by the defendant was a privileged communication, and that, there being no evidence of express malice, they were bound to find a verdict for the defendant: —

Held, first, that the direction was wrong.

Secondly, that the paper was not a privileged communication.

Thirdly, that there was, in the circumstances of the case, evidence of malice which ought to have been left to the jury.

Fourthly, that the alleged libel ought to have been submitted to the jury, in order that they might judge whether there was any evidence of malice on the face of it.

ERROR from the Court of Exchequer on a bill of exceptions. The action was for libel, and the declaration stated, by way of inducement, that twenty years before the time of the composing, &c., the plaintiff had been a schoolmaster, and carried on that business for the obtaining his livelihood, and kept a school, and before and at the time, &c., had ceased to be master of such school, but was about to keep another school, and had not abandoned the business of a schoolmaster; and then alleged that the defendant, knowing the premises, but intending to injure the plaintiff in the way of his said business, falsely and maliciously published of the plaintiff, and concerning him in the way of his business of a schoolmaster, and of and concerning the said project of keeping the said school, and the said projected school, a libel, purporting to be an address to the parishioners of Crawley from the defendant, containing, amongst other things, the false, scandalous, malicious, and defamatory matter following: "The very attempt (meaning the said project) betrays a spirit of opposition to authority, and is a justification of the conduct of the managers of the school, who have, nevertheless, thereby incurred no little odium. No rightly disposed Christian, who receives in simple faith the teaching of inspiration, 'Obey them who have the rule over you, and submit yourselves,' can expect God's blessing to rest upon such an undertaking (meaning the said projected school) under the circumstances. I (meaning the defendant) conceive it to be my duty to warn all my parishioners against affording any countenance whatever to the projected new school, (meaning the school which the plaintiff so projected,) either in the case of the richer by subscriptions, or of the poor by sending their children to it for instruction.. It (meaning the said projected school) will be to all intents and purposes a schismatical school, for its (meaning the said projected school's) tendency will be to produce disunion and schism in a matter which, of all others, requires union — the education of the poor. Those who aid and abet him (meaning the plaintiff) in any way will be partakers with him (meaning the plaintiff) in his (meaning the plaintiff's) evil deeds.

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‘Mark them (meaning, amongst others, the plaintiff) which cause divisions and offences, and avoid them,’ (meaning, amongst others, the plaintiff.) (Rom. xvi. 17.) I have thus performed a necessary, though a very irksome duty. I now leave you to take your own courses, ‘forewarned, forearmed,’ and in a humble hope that the God of peace and union may take us all into His holy keeping, may prosper what seems conducive, and overrule what seems opposed, to His own glory and our edification in Christ.” The second count charged the same libel, but differed from the first by alleging, by way of inducement, that before and at, &c., the plaintiff carried on the business of a schoolmaster for the obtaining his livelihood, and in the way of his said business kept a school, which was frequented by divers children as scholars, to be taught by the plaintiff for reward, &c. By reason of which grievances the plaintiff was injured, and the number of scholars at his school was not so great as it otherwise would have been, and ten scholars were removed, and the plaintiff’s reputation injured, &c. Plea, general issue. It appeared at the trial, before the Chief Baron, at Westminster, on the 14th June, 1852, and upon the bill of exceptions, that the plaintiff was a schoolmaster, and previously to October, 1831, kept a school at Crawley, in Sussex. Crawley and Ifield were adjoining parishes; one side of the village of Crawley is in Crawley, the other in Ifield. In October, 1831, there was, and thence hitherto has been, a national school on the principles of the Established Church, partly supported by the subscriptions of the richer inhabitants of Crawley and Ifield, and partly by small payments of the scholars, called, “The Crawley and Ifield National School,” whereof the schoolhouse was in Ifield, and of which the rector of Crawley and the vicar of Ifield were trustees. One of the rules of the school was, that the children should be educated in the principles of the Church of England, and the catechism taught; and another was, that the establishment should be under the inspection of the rector and vicar. In October, 1831, the plaintiff was appointed schoolmaster of this school, and continued so till his removal in January, 1852. Shortly before this removal, the defendant asked the plaintiff if he would consent to teach the Sunday school in connection with the national; but he declined the additional labor, and did not admit that he was also actuated by religious scruples. He did admit that on one occasion he might have said he could not teach one thing and believe another, but denied that it had reference to the conversation about the school. The defendant had become rector in 1848. The plaintiff attended the church, and had been confirmed, but had never received the sacrament, and had conscientious scruples about being a communicant. After the removal of the plaintiff the school was carried on under another master, and, having friends in Crawley, the plaintiff, in January and February, 1852, was endeavoring to form another school in the parish to gain his livelihood, and opened such school in the parish of which the defendant was the rector. During the weekdays, from the 12th January, 1852, and on Sundays, the schoolroom in which he taught was used as a dissenting chapel, and had been so used before he took it. On the 7th and 8th January,

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1852, the defendant delivered to an inhabitant of Crawley, at her house in the parish, a printed paper containing the alleged libel; this inhabitant was in the habit of attending the defendant's church at the time, but had not lately attended, and was a person whom he visited as a parishioner. A few days after the 12th January, the defendant delivered a similar paper to an inhabitant of Ifield, at her house; this person had at the time two children at the plaintiff's school, and sometimes attended the defendant's church, at Crawley, and had often been visited by him as clergyman of the adjoining parish, but had not asked his particular advice as to her children. Both persons were requested by the defendant to read the paper. It commenced:—

"To the Parishioners of Crawley.

"To my dear friends. Circumstances have occurred in school matters, connected with this place, which render it incumbent upon me as your pastor, whose office it is to watch for your souls as one that must give an account, to address you a few words of warning on a projected new school, which is in contemplation by the late master of the 'Crawley and Ifield National School,' for the education of the poor in the principles of the Established Church.

"As long as he remained outside the bounds of this parish, the spiritual charge of which has been committed to me by the bishop, I should have abstained from this public notice of his conduct, but his well-known intention of setting up a new school in my parish, must be my apology for troubling you with these few lines. The circumstances are these: The schoolmaster has been dismissed from the Crawley and Ifield school by the school committee, under whose management it is now placed, according to the provisions of an act of parliament, 4 & 5 Vict. c. 38. Among the reasons for his dismissal the chief one was, that it was thought desirable to place the Sunday and day schools under one and the same superintendence.

"This was thought the best and most economical arrangement, (considering the limited funds at the disposal of the committee,) by which the expense of two masters, one for each school, would be avoided. Some time ago, (on the resignation of the Sunday school by Mr. Bridger,) Mr. Gilpin was applied to by me to conduct it, at least until some better arrangement could be made. This he decidedly refused—he would have nothing to do with the Sunday school. His refusal at once opened our eyes to the necessity of coming to some better arrangement with regard to the two schools; that is to say, of having one master for the day and Sunday schools, which, indeed, is the most natural as well as the most universal custom in our parishes. Hence the vote of the school committee, and the dismissal of the schoolmaster. He has no cause for feeling aggrieved at what has taken place; dismissal from such a situation is no such an unusual thing for less weighty reasons; still less reason is there for him to set up a new school in my parish, which must of necessity assume the character of, and be carried on in opposition to, the national school.

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“ Granted that he is qualified to conduct a school, are there not vacancies occurring every day in different parts of the country — nay, more, are there no localities notoriously destitute of any means of education, where his services may be more legitimately and more usefully employed than in seeking to set up an opposition school in the parish, which must weaken both? A small village like ours, from its size and population, cannot afford to pay the burden of two such schools; one must endanger the success of the other. In union alone is strength.” [Then followed the alleged libel set out above, and the letter concluded.]

“ I subscribe myself,

“ Your affectionate friend and pastor,

“ C. A. FOWLER.

“ Rectory, Crawley, January 7, 1852.”

POLLOCK, C. B., directed the jury, “ that the said several matters so produced and given in evidence on the part of the plaintiff were not sufficient to justify them in finding a verdict for the plaintiff, but that they showed that the paper so published by the defendant as aforesaid, was a privileged communication; and that there being no evidence of express malice, the jury were bound, in point of law, to find a verdict for the defendant.” The exception to the ruling was, that the direction was wrong, and that the case ought to have been left to the jury.

Macnamara, for the plaintiff in error, (the plaintiff below.) First, the occasion did not justify the publication of the letter; secondly, if it did, the case ought to have been left to the jury, for them to determine from the circumstances, including the style and character of the language used, whether the defendant acted *bonâ fide*, or was actuated by malicious motives. Neither the plaintiff’s conduct nor the defendant’s position as clergyman justified the letter. All that the plaintiff had done was, after his removal from the national school, to set up a school in the place where he was best known, the defendant’s parish, in order to gain his livelihood there. The defendant had no right, by virtue of his office of rector, to single him out from his other parishioners, and distribute handbills to persons both in and out of the parish for the purpose of preventing him from gaining his livelihood. There is no suggestion of error in doctrine on the part of the plaintiff; it is only said that he should go where education was more wanted, and where the defendant’s school was not. The plaintiff followed the business of schoolmaster to get his living, upon the same footing as any other trade might be pursued. And if a clergyman had a farm, and his bailiff set up another in his parish, would the clerical farmer be justified in publishing a libel of this nature to get rid of a rival farmer? Secondly, the question of malice was for the jury.

[MAULE, J. The Chief Baron does not say it was not a libel; he assumes it to be so, and says it is a privileged communication.]

The meaning of “ privileged communication ” is, that the occasion of making it rebuts the *primâ facie* inference of malice arising from

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a statement prejudicial to the plaintiff's character. The *onus* of proving malice, in fact, is then thrown on the plaintiff; but he is not bound to prove it by extrinsic evidence; he has a right to require the alleged libel to be submitted to the jury, that they may judge whether there is evidence of malice on the face of it. *Wright v. Woodgate*, 2 C., M. & R. 573; *Toogood v. Spyring*, 1 C., M. & R. 181. The question, whether the occasion justifies the communication, or, in other words, whether it is a privileged communication, is for the judge; the *bona fides* for the jury. There is both malice in fact and malice in law — the former denoting an act done from ill-will, the latter a wrongful act done intentionally, without just cause or excuse.

Maude, contra, contended that the direction of the learned judge was right. Whether or not the libel was a privileged communication, was a question for the judge. Having decided that it was a privileged communication, he was right in not allowing the case to go to the jury on the question of malice, and in not allowing them to look at the libel to see if there was malice. *Somerville v. Hawkins*, 10 C. B. 583; s. c. 3 Eng. Rep. 450, decides that in slander it is not enough, to entitle the plaintiff to have the question of malice left to the jury, that the facts proved are consistent with the presence as well as absence of malice; for that in cases of privileged communication, malice must be proved, and therefore, its absence must be presumed until such proof is given. The rule, that the question of privileged communication is for the judge, would be inoperative if, nevertheless, the question of malice is to be left to the jury.

[MAULE, J. In *Somerville v. Hawkins*, it was held a privileged communication, and it was objected that the judge ought to have left the question of malice to the jury. The court do not there say that the question ought not to be left to the jury, but that there was nothing in the facts of that case from which malice could be inferred, and that it was, therefore, a privileged communication. It shows, therefore, that if there had been facts to show malice, the case ought to have been left to the jury.]

In slander, if the facts proved are such that the communication is by the rules of law privileged, the judge ought not to leave any question to the jury as to malice, unless the plaintiff gives further evidence showing a probability that the communication was made maliciously rather than *bonâ fide*. *Taylor v. Hawkins*, 16 Q. B. 308; s. c. 5 Eng. Rep. 253. It is apprehended that the defendant acted as he did under a sense of duty, and that there is no evidence of malice. A rector issues a circular to his parishioners, stating his views in respect of a person setting up a school in his parish.

[WIGHTMAN, J. The defendant was removed because he would not undertake both the national and Sunday schools.

MAULE, J. "Those who aid him in any way will be partakers with him in his evil deeds." Let us see the epistle; that will explain the sense in which these words are used. (His lordship then read the 2d Epistle of John, from v. 5 to v. 11.) I do not think that softens the matter at all. This is a curious letter: the defendant's hope is,

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that God may prosper what seems conducive, and overrule what seems opposed, to His glory. I should have thought the proper thing to pray for was, that what is conducive to God's glory might prosper, and what is opposed to it might be overruled.]

It is submitted, that, as a matter of opinion, he was entitled to express what he thought of the plaintiff's school in a letter to his parishioners, and to warn them.

[TALFOURD, J. One was not a parishioner.

WIGHTMAN, J. The libel is of the plaintiff in his trade, not stating that he is an unfit person, but objecting to his setting up in that particular place.] [He cited *Gardner v. Slade*, 13 Q. B. 796.]

MAULE, J., (without calling on *Macnamara* to reply,) having read the direction of the Lord Chief Baron. We think that the communication was not privileged, and that there was evidence of malice which ought to have been left to the jury. The libel contains grave accusations. The charge of betraying a spirit of opposition to authority is clearly intended by the defendant to import something seriously wrong, because he goes on to say: "No rightly disposed Christian, who receives in simple faith the teaching of inspiration, 'Obey them who have the rule over you, and submit yourselves,' can expect God's blessing to rest upon such an undertaking." It is quite clear that this is intended to imply such an opposition to authority as to be an offence to Almighty God, and a very serious offence—one by which he forfeits God's blessing, which is supposed to follow all well-meant and useful endeavors. [His lordship read the libel, "I conceive it to be my duty to warn," &c., down to "those who aid and abet him in any way, will be partakers with him in his evil deeds."] That will be understood by reference to the passage in St. John; * no doubt in that sense, it must have been meant. That, then, being the nature of the libel, is there any thing in the position of the defendant which will render it not a libel? It appears from the evidence, that the plaintiff, having given satisfaction to the defendant by his teaching at the national school, was asked by him to undertake the Sunday school, also, but the plaintiff declined the additional labor. He was then removed. He prefers getting his livelihood as a schoolmaster in a place where people know him, and have an opinion of his powers, instead of elsewhere. The rector of the parish then writes these circulars. I cannot conceive that he had the right to do so. He has some power of supervision of his parishioners. He may remonstrate with them in aid of their spiritual welfare, but had no right to issue such a letter as this. To hold it to be a privileged communication would be to carry the principle upon which such communications are protected into regions of indistinctness, which would be very inconvenient. It is not a privileged communication. The very attempt

* 2 John, v. 10, 11: "If there come any unto you, and bring not this doctrine, receive him not into your house, neither bid him God speed. For he that biddeth him God speed is partaker of his evil deeds."

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to injure the plaintiff in the business he is carrying on — not remonstrating with him, but sending letters to his parishioners and others — shows the complexion of the libel. The libel itself may be looked at by the jury to see if there was malice in its publication. You cannot exclude the nature of it from them on this question. It would be absurd to say they might not look at it. The terms of this libel, on the face of it, are not without characters of malice. Amongst other matters, the attempt to make a spiritual delinquency out of the plaintiff's conduct, and the piece of religious composition at the end, strangely worded as it is, are all things for the jury to look at on the question of malice. The direction, therefore, was wrong, and there must be a *venire de novo*.

Venire de novo.¹

FAIRHURST and WIFE v. THE LIVERPOOL ADELPHI LOAN
ASSOCIATION.

January 31, 1854.

*Feme Coverte — Fraudulent Representation — Infant — Promise of
Marriage — Public Policy.*

Although a married woman is responsible for torts, and consequently for frauds, committed by her during coverture, yet it is otherwise when the fraud is directly connected with a contract by her, and is the means of effecting it, and parcel of the same transaction; and therefore, where a married woman, by a false and fraudulent representation that she was sole, induced a party to advance money to another, on the security of a promissory note signed by her: —

Held, that no action lay against the husband and wife.

¹ It was likewise held in *White v. Nichols*, 8 Howard, (U. S.) R. 266, (1845,) that in cases of privileged communications, it being incumbent on the plaintiff in an action for libel, to prove express or actual malice, he was entitled to have the alleged libel submitted to the jury, as they were the tribunal to decide whether such malice did or did not exist. And see *Lathrop v. Hyde*, 25 Wend. 448, (1841.)

In the first case, the subject of privileged communications was much discussed, and said to be of four kinds: —

“1. Wherever the author and publisher of the alleged slander acted in the *bonâ fide* discharge of a public or private duty,

legal or moral, or in the prosecution of his own rights or interests.

“2. Any thing said or written by a master, in giving the character of a servant who has been in his employment.

“3. Words used in the course of a legal or judicial proceeding, however hard they may bear upon the party of whom they are used.

“4. Publications duly made in the ordinary mode of parliamentary proceedings, as a petition printed and delivered to the members of a committee appointed by the House of Commons to hear and examine grievances.”

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Dictum per Curiam, an infant is not liable for a fraudulent representation that he was of full age, whereby a party has been induced to contract with him.

Quære, whether the doctrine in *Wild v. Harris*, 7 C. B. 999; 7 Dowl. & L. 114, that a married man may be sued for breach of promise of marriage to a female who at the time of making the contract with him was ignorant of his being married, ought to be upheld, such a contract being against public policy?

THIS was a writ of error brought on a judgment of the court of passage for the borough of Liverpool. The declaration alleged that one T. B. had applied to the plaintiffs for a loan of 30*l.*, on the security of a promissory note to be signed by himself, the female defendant, and two other persons, for the payment by them to the plaintiffs of the said sum by weekly instalments, and in case of default in any one of such payments, the whole of the said sum of 30*l.* then remaining unpaid to be paid on demand; that the female defendant signed the said promissory note as such surety, and by falsely and fraudulently representing to the plaintiffs that she was sole and unmarried at the time of signing the same, and that her name then was Jane Lloyd, induced the plaintiffs to lend the sum of 30*l.* to the said T. B., on the security of that note, when in fact she was then married to the male defendant, William Fairhurst, as she then well knew; by means of which premises a part of the said sum of 30*l.*, the same having become due and payable, and divers costs incurred by the plaintiffs in suing the defendants on the said promissory note, before they knew that the female defendant was married when she signed the same, became loss to the plaintiffs. To this declaration the defendants pleaded, first, the general issue; secondly, that the female defendant did not falsely and fraudulently represent to the plaintiffs that she was sole and unmarried at the time of signing the promissory note; thirdly, that the plaintiffs did not lend the said sum of 30*l.* to T. B. on the security of that note. Issue having been joined on all these pleas, the jury found on the first for the plaintiffs; on the second, that the female defendant did falsely and fraudulently represent to the plaintiffs that she was sole and unmarried at the time of signing the promissory note; and on the third, that the plaintiffs did lend the 30*l.* to T. B. on the security of that note. On these findings, judgment having been entered for the plaintiffs in the court below, the present writ of error was brought by the defendants. The case was argued during the present term, on the 18th January, before Pollock, C. B., Parke, B., Alderson, B., and Martin, B.

Hill, for the plaintiffs in error. The action in this case cannot be maintained. It is brought against a man and his wife for a supposed tort committed by the wife, in the shape of a fraudulent representation to a third party. Now, though a husband may be sued with his wife for a trespass committed, or a slander spoken, by her, it is otherwise when the cause of complaint is a representation made by her in connection with a contract with another person. In *Cooper v. Witham*, 1 Lev. 247; 1 Sid. 375; 2 Keb. 399, it was held, that where a married woman, by means of a false representation that she was sole induced a man to marry her, no action could be maintained against her husband.

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[POLLOCK, C. B. It has been held that an infant is not liable for a false representation by which he induces a party to contract with him. Is there any distinction in this respect between the case of an infant and that of a married woman?]

None. The non-liability of the infant under such circumstances is established by *Johnson v. Pye*, 1 Sid. 258; 1 Lev. 169; 1 Keb. 913, recognized in *Price v. Hewett*, 8 Exch. 146; s. c. 18 Eng. Rep. 522. In *Green v. Greenbank*, 2 Marsh. 485, also, it was laid down, that where the substantial ground of action rests on promises, the plaintiff cannot by declaring in tort, render a person liable who would not have been liable on his promise; and consequently where a plaintiff declared that, having agreed to change mares with the defendant, the defendant, by falsely warranting his mare to be sound, well knowing her to be unsound, falsely and fraudulently deceived the plaintiff, &c., it was held that the infancy of the defendant was a good plea in bar.

The Court then called on

Willes, for the defendants in error. The general rule of law is, that a married woman is liable for all torts committed by her as if she were sole, and though during her coverture her husband must be joined as a defendant, that is only for the sake of conformity, and on his death the cause of action survives against her. Now fraud has always been classed by law in the same category with force; the reason of which is, that in both cases the consent of the injured party to the wrongful act is wanting. This view is supported by Bac. Ab., "Baron and Feme," G., and 2 Kent. Com. 149. *Head v. Briscoe*, 5 Car. & P. 484, goes even further, for it shows that a man is answerable to a third person for a wrong done by his wife, though they are permanently living apart. In *Catterall v. Kenyon*, 3 Q. B. 310, cattle wrongfully taken in execution were lodged in the stable of a party, and on their being demanded of his wife, she said she would make inquiry, and on a subsequent demand said she was indemnified, and need not be applied to again; the cattle having accordingly been detained and sold, it was held that trover lay against the husband and wife. In *Rawlings v. Bell*, 1 C. B. 951, where an action was brought against a husband and wife for a false representation by the wife to a broker, that she was entitled to distrain on certain premises, the court of common pleas held that it was properly left to the jury to say whether, on the circumstances of the case, that statement by the wife was false and fraudulent. *Cooper v. Witham* is unlike the present case; for, according to the report in Siderfin, the ground of decision was, that the cause of action merged in the felony. Moreover, in that case the plaintiff was not induced to part with property through the misrepresentation of the female, and his being induced to marry her did not entail on him any loss of which the law could take cognizance.

[ALDERSON, B. In *Wild v. Harris*, 7 C. B. 999; 7 Dowl. & L. 114, it was held that a married man may be sued for damages for

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breach of promise of marriage to a woman who did not know that he was married at the time of entering into the engagement with him.]

That decision ought not to be acted on; it is clearly against the policy of the law.

[POLLOCK, C. B. Yes; it is exceedingly doubtful, when taken with reference to many considerations, social as well as religious.]

An estate tail may indeed be limited to a married man and the heirs of his body by another person than his then wife; but that is not his own act. As to the analogy sought to be drawn from the cases respecting infants, it is doubtful if the doctrine laid down in *Johnson v. Pye* ought to be upheld; but supposing that decision right, it is inapplicable here. The case of an infant and *feme coverte* differ in this; that the former may bind himself by certain species of contracts, e. g. for necessities, which the latter cannot. But even in *Johnson v. Pye*, as reported by Levinz and Keble, the court took a distinction between a bare false affirmation by an infant, which would not be fraudulent in itself, and a false affirmation where a fact is joined with it, as for instance, cheating with false dice. Besides, the true ground of that decision appears from the report in Keble, namely, that it was the plaintiff's own credulity which misled him. The fact of infancy is triable by inspection, and the mere appearance of a party offering to contract with another would in most cases show that he is an infant. *Green v. Greenbank* is not an authority, for, in an action on the case in tort for breach of a warranty for goods, the *scienter* is immaterial, *Williamson v. Allison*, 2 East, 446.

[PARKE, B. In *Jennings v. Rundall*, 8 T. R. 335, it was held that you cannot convert a contract into a tort to enable you to sue an infant. Where the tort is incidental to the contract, as the contract is altogether void, the fraud goes for nothing.]

Hill, in reply. *Cooper v. Witham* shows that the person who believes the statement of a married woman in such a case must take the consequences of his credulity. *Catterall v. Kenyon* is not applicable, for there was ample evidence of a conversion by the wife; neither is *Rawlings v. Bell*; for, independent of the question of fraud, the court thought the action could not be maintained.

[ALDERSON, B. Whatever my own impression might be in such a case, I should always take the opinion of the jury on the question of fraud, as I did there.]

Cur. adv. vult.

The judgment of the court was now delivered by

POLLOCK, C. B. The question in this case is, whether an action will lie against a husband and wife, for a false and fraudulent representation by the wife to the plaintiffs, that she was sole and unmarried, at the time of her signing a promissory note as surety to them for a third person, whereby they were induced to advance a sum of money to that person.

We think the action will not lie.

A *feme covert* is unquestionably incapable of binding herself by a contract; it is altogether void, and no action will lie against her husband, or herself, for the breach of it. But she is undoubtedly responsible for all torts committed by her during coverture, and the husband must be joined as a defendant. They are liable, therefore, for frauds committed by her on any person, as for any other personal wrong.

But when the fraud is directly connected with the contract with the wife, and is the means of effecting it, and parcel of the same transaction, the wife cannot be responsible, and the husband be sued for it together with the wife. If this were allowed, it is obvious that the wife would lose the protection which the law gives her against contracts made by her during coverture; for there is not a contract of any kind which a *feme covert* could make, whilst she knew her husband to be alive, that could not be treated as a fraud; for every such contract would involve in itself a fraudulent representation of her capacity to contract. Accordingly, it has been held in the case cited, and so much commented upon, during the argument, (*Cooper v. Witham*, reported in 1 Lev. 247,) that the wife could not be bound in such a case. It is true that Twisden, J., assigned another reason, namely, that the wife having represented herself to be sole, and induced the plaintiff to marry her, it was a felony in her, and so no action could lie till the felony was tried; but it was said, that if the wife had been pardoned, by which that objection was removed, yet it seemed the action would not lie, and the reason was that "the fact sounded in contract." The case is also reported in 1 Sid. 375, and there one of the reasons stated is, that the ground of the action was "the communication and contract of the wife."

In the case of an infant it was held, for a similar reason, that he could not be made liable for a fraudulent representation that he was of full age, whereby the plaintiff was induced to contract with him, *Johnson v. Pye*, 1 Sid. 258; 1 Keb. 913, and according to the latter report, it was said, that if the action should be maintainable, "all the pleas of infancy would be taken away, for such affirmations are in every contract."

*Judgment reversed.*¹

¹ That a husband is liable for the torts of his wife, is, as a general rule, as fully settled on this side of the Atlantic, as in England; and the rule extends to acts of trespass, negligence, breaches of trust, and generally to frauds. See *Hawks v. Harmer*, 5 Binney, 43; *Knox v. Pickett*, 4 Dess. 92; *Palmer v. Wakefield*, 3 Beavan, 227; *Cox v. Hoffman*, 4 Dev. & Batt. 180.

And this liability extends, like that for her contracts, to any acts done by her before the marriage. *Id.* But a distinction

has been taken in one respect, between a husband's liability for his wife's torts *dum sola*, and that for her debts. For while all agree that if she is wife *de facto* only, he may still be liable for her debts *dum sola*, (if sought to be charged during coverture.) *Norwood v. Stevenson*, Andr. 227, cited in 4 Campb. 216; *Tracy v. McArleton*, 7 Dowl. P. C. 532.

But to make him responsible for her torts while sole, it has been thought the marriage must have been *de jure*. Accordingly, where a woman married the

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HADLEY and another v. BAXENDALE.

February 23, 1854.

Duty of Judge at Trial—New Trial—Measure of Damages—Contract—Carrier—Taunton's Reports, Vol. 8.

Where there is an established rule by which the jury should be governed in the measure of damages, it is the duty of the judge to bring it to their notice, and direct them in accordance with it; and his omitting to do so is ground for a new trial.

Where two parties have made a contract which one of them has broken, the damages which the other ought to receive should be, either such as may, fairly and reasonably, be considered arising naturally, that is, according to the usual course of things, from the breach of contract itself, or, such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it.

Where a contract is made under special circumstances, and those circumstances are communicated by one of the contracting parties to the other, the damages resulting from the breach of the contract which they would reasonably contemplate are, the amount of injury which would ordinarily follow from a breach of contract under those special circumstances. But if the special circumstances are unknown to the party breaking the contract, he at the most can only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract.

A common carrier contracted with a miller to carry for hire two pieces of iron forming the broken shaft of a mill, and deliver the same to an artificer to serve as a model for a new one. A shaft being indispensable to the working of the mill, and the miller not having another, the mill necessarily remained idle until the new shaft could be supplied, but of this the carrier was not aware. He did not, however, deliver the iron to the artificer within a reasonable time, and, a delay having consequently arisen in the delivery of the new shaft, was sued by the miller for a breach of his agreement:—

Held, that the plaintiff could not recover as damages the loss or profits incurred by the stoppage of the mill.

Borradaile v. Brunton, 8 Taunton, 535; and *J. B. Moore*, 582, doubted.

Per Parke, B. The 8th volume of Taunton's Reports is of doubtful authority.

THE plaintiffs, owners of a steam grist-mill, contracted with the defendant, a carrier of goods by railway, to carry, for hire, two pieces of iron, constituting the broken shaft of a mill, and deliver the same

second time, her first husband being still alive, her second husband was held not liable for her torts previous to her cohabitation with him. *Overhall v. Ellswell*, 1 Ashmead, 200.

The point taken in the case in the text, does not seem to have been directly adjudged in America, but Judge Reeve, (Dom. Rel. 72,) refers to it, and is of a contrary opinion from the Court of Exchequer above. He says: "I entertain no doubt of his liability, on the same ground as he would be liable for any other tort committed by her to which he was not

privy. If the wife destroys the tradesman's property by any act of violence, although against the husband's will, he would yet be liable. So if the tradesman is cheated out of his property by a wife, the husband is liable with her, in an action of trespass on the case." So far as the analogy extends, it may be inferred, the courts in this country would adopt the doctrine in the case, since they incline to apply it to cases of infants, and support *Johnson v. Pie*. See *Price v. Hewett*, 18 Eng. Law and Eq. R. 524, and editor's note.

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to an artificer who lived at a considerable distance, in order to serve as a model for a new shaft to be made for them by him. The defendant having violated his agreement by not delivering these pieces of iron within a reasonable time, a delay necessarily arose in supplying the new shaft, and a shaft being indispensable to the working of the mill, and the plaintiffs not having any other, the mill remained idle until the delivery of the new one; but although there was evidence that the defendant knew the mill was standing still, he was not aware that this was for want of the shaft for which the iron delivered to him was to serve as a model. An action having been brought against the defendant, for not delivering the articles he had contracted to carry, he pleaded by paying into court 25*l.*, their estimated value, and the cause was tried before Crompton, J., when the jury gave a verdict for the plaintiffs for 25*l.* more. A rule was obtained in Michaelmas term for a new trial, on the ground that the judge had misdirected the jury in not telling them that they could not award damages for the loss of profits incurred by the plaintiffs in consequence of the mill standing still for want of the new shaft, such damage being too remote. This rule was argued at the present sittings, on the 1st and 2d February, before Parke, B., Alderson, B., Platt, B., and Martin, B.

Keating and *Dowdeswell*, showed cause. The rule prohibiting remote or consequential damages is fully discussed in *Sedgwick on Damages*, c. 3, where the Roman and French laws on the subject are stated, and the English and American cases collected and examined.

[PARKE, B. The rule laid down on the subject of damages in the Code Napoléon, seems a sensible one: "Le débiteur n'est tenu que des dommages et intérêts qui ont été prévus ou qu'on a pu prévoir lors du contrat, lorsque ce n'est point par son dol que l'obligation n'est point exécutée." (Code Civil, s. 1150.) "Dans le cas même où l'inexécution de la convention résulte des dol du débiteur, les dommages et intérêts ne doivent comprendre, à l'égard de la perte éprouvée par le créancier et du gain dont il a été privé, que ce qui est une suite immédiate et directe de l'inexécution de la convention." Id. s. 1151.]

The same distinction was taken in the old French law; but it is an unsound one, for the remoteness of damage cannot depend on the intention of parties, which must necessarily be the case if fraud is one of the tests of remoteness. The English law proceeds on a different and more rational principle, namely, that damages are given by way of compensation for the breach of contract committed or wrongful act done, and, as it is impossible to estimate their amount by any rule laid down beforehand, leaves them to be assessed by the jury on consideration of the circumstances of each case. *Ingram v. Lawson*, 6 Bing. N. C. 212, per Coltman, J., and many cases illustrative of this are to be found in the books. In *Everard v. Hopkins*, 2 Bulst. 332, the court was of opinion that where a master sends his servant, on the servant's horse, to pay the penalty of

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a bond, and while on his journey, a smith, in shoeing, pricks his horse, by reason of which the money is not paid, both the master and servant may have their several actions for the wrongs sustained by them. In *Nurse v. Barns*, T. Raym. 77, where a party in consideration of 10*l*. promised another to let him enjoy certain mills, the contract having been broken, it was held that the jury were justified in giving damages by reason of the loss of stock laid in. In *Borradaile v. Brunton*, 8 Taunt. 535; 2 B. Moo. 582, an action was brought on the warranty of a chain cable, that it should last two years, as a substitute for a rope cable of sixteen inches; and it was alleged that within two years the cable broke, and that thereby an anchor to which the cable was affixed was lost. A verdict being found for the value of the cable and anchor, a motion was made for a new trial, and it was insisted that the principle contended for by the plaintiff would render the defendants liable for the loss of the ship, if, on the breaking of the cable, that event had happened. But the loss was held not too remote, and Dallas, C. J., said: "The defendants warrant the cable sufficient to hold the anchor, and it is proved not to be sufficient. The holding of the anchor by the cable is the very essence of their warranty;" and a new trial was refused.

[PARKE, B. Sedgwick (p. 97) remarks on that case, that "either the case is ill reported, or the learned Chief Justice gave the warranty a very broad construction; nothing is said in Taunton about the 'cable being warranted to hold the anchor.'" The 8 Taunton is a very apocryphal authority. It was not supervised by Mr. Taunton himself, but made up from his notes.]

Black v. Baxendale, 1 Exch. 410, is a much stronger case than this. There goods were intrusted to a carrier to be delivered at a certain place on Thursday, to be ready for market on Saturday. The carrier was not aware of that, but in consequence of the non-delivery until the Monday following, the plaintiff removed them to another place for sale, and it was held that the expenses so incurred might be recovered. There are many authorities to show that on questions of this nature, the intent of a defendant is immaterial. In the well known case of *Scott v. Shephard*, 2 W. Bl. 892, where a man threw a squib, which was thrown about in self-defence by other persons, and, at last, put out a party's eye, the original thrower was held liable.

[ALDERSON, B., referred to *Langridge v. Levy*, 2 M. & W. 519; 4 M. & W. 337.]

It must be conceded that there are certain classes of cases which apparently point to a contrary conclusion, but in all such there is an implied contract that certain damages are to be paid in case of default.

[PLATT, B. Do you mean to contend that, however remote the damage, it must go before the jury?]

No: it may be so remote that evidence of it would be inadmissible, but if evidence of it can be received, the jury may take it into their consideration. Independently of the general question, in the actual case before the court, the loss of profit of the mill was a natural and

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necessary consequence of the negligence of the defendant, and it is not even suggested that the damages awarded were excessive. The principle that damages may be recovered for the loss of profits, has been recognized in many cases. *Kettle v. Hunt*, B. N. P. 78 a; *Brandt v. Bowlby*, 2 B. & Ad. 932; *Ward v. Smith*, 11 Price, 19; *Waters v. Towers*, 8 Exch. 401; s. c. 20 Eng. Rep. 410; *Bodley v. Reynolds*, 8 Q. B. 779.

Whateley, Willes, and Phipson, contra. Although the estimating the amount of damages is the province of a jury, it is the duty of the judge to direct them in its exercise, and point out the limits within which their discretion is to be confined. *Tindall v. Bell*, 11 M. & W. 228; *Black v. Baxendale*, 1 Exch. 410. Now, it is a principle that the damages recoverable at law must be the immediate and necessary result of the wrongful act of the defendant, and not a remote consequence of it. "*Injuria non remota causa, sed proxima spectatur*," (Bac. Max. reg. 1.) And the principle is confirmed by the following cases: *Flureau v. Thornhill*, 2 W. Bl. 1078; *Vicars v. Wilcocks*, 8 East, 1; *Boyce v. Bayliffe*, 1 Camp. 58; *Walton v. Fothergill*, 7 Car. & P. 392; *Kelly v. Partington*, 5 B. & Ad. 645; *Jones v. Gooday*, 8 M. & W. 146; *De Vaux v. Salvador*, 4 Ad. & El. 420; *Holloway v. Turner*, 6 Q. B. 928; *Archer v. Williams*, 2 Car. & K. 26; *Watson v. The Ambergate Railway Company*, 15 Jur. 448; s. c. 3 Eng. Rep. 497; and *Foxhall v. Barnett*, 2 El. & Bl. 928; s. c. 22 Eng. Rep. 179. The American authorities are to the same effect. Sedgwick, in his treatise, expresses himself thus: "In regard to the *quantum* of damages, instead of adhering to the term 'compensation,' it would be far more accurate to say, in the language of Domat, that 'the object is to discriminate between that portion of the loss which must be borne by the offending party, and that which must be borne by the sufferer.' The law, in fact, aims not at the satisfaction, but at a division of the loss. And it is to be borne in mind that the same deficiency of compensation exists in the case of defendants as well as plaintiffs. . . . 'Every defendant,' says Mr. Broom, 'against whom an action is brought, experiences some injury or inconvenience beyond what the costs will compensate him for.'" And again: "In a recent case in Louisiana, it is said, recognizing the authority of Pothier and Touillier, that 'the damages which a party can recover on the breach of a contract, are those which are incidental and caused by the breach, and may reasonably be supposed to have entered into the contemplation of the parties at the time of the contract.'" The recent case of *Lumley v. Gye*, 2 El. & Bl. 216; s. c. 22 Eng. Rep. 367, shows that the question of malice cannot be always excluded in cases of this nature. In the present case, the defendant is sued as a carrier, and consequently is only liable to the ordinary obligations of one; but it is sought to render him liable for damages occasioned by special circumstances with which he was not made acquainted, and arising out of the acts of third persons to which he was neither party nor privy. The instance in which the law has been most strained against carriers, is *Siordet v. Hall*, 4 Bing. 607, where a carrier was held liable

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for damage to a cargo in consequence of a pipe having been burst by frost, but that falls far short of what is sought to be done here.

Cur. adv. vult.

The judgment of the court was now delivered by

ALDERSON, B. We think that there ought to be a new trial in this case. But, in so doing, we deem it to be expedient and necessary to state explicitly the rule by which the judge at the next trial ought, in our opinion, to direct the jury to be governed, when they estimate the damages. It is, indeed, of the last importance that we should do this, for if the jury are left without any definite rule to guide them, it will in such cases as these manifestly lead to the greatest injustice. The courts have done this on several occasions, and in *Blake v. The Midland Railway Company*, 21 Law J. Rep. (N. S.) Q. B. 233; s. c. 10 Eng. Rep. 457, the court granted a new trial on this very ground, that the rule had not been definitely laid down to the jury by the learned judge at Nisi Prius. "There are certain established rules," this court says in *Alder v. Keighley*, 15 M. & W. 117, "according to which the jury ought to find." And the court, in that case, adds: "Here, there is a clear rule—that the amount which would have been received if the contract had been kept, is the measure of damages if the contract is broken."

We think the proper rule in such a case as the present is this: Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be, either such as may, fairly and reasonably, be considered arising naturally, that is, according to the usual course of things, from such breach of contract itself, or, such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances, under which the contract was actually made, were communicated by the plaintiff to the defendant, and thus known to both parties, the damages, resulting from the breach of such a contract which they would reasonably contemplate, would be, the amount of injury which would ordinarily follow from a breach of contract under those special circumstances, so known and communicated. But, on the other hand, if those special circumstances were wholly unknown to the party breaking the contract, he at the most could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For had the special circumstances been known, the parties might have especially provided for the breach of contract, by special terms as to the damages in that case, and of this advantage it would be very unjust to deprive them.

The above principles are those by which we think the jury ought to be guided in estimating the damages arising out of any breach of

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contract. It is said that other cases, such as breaches of contract in the non-payment of money, or in the not making a good title to land, are to be treated as exceptions from this, and as governed by a conventional rule. But, as in such cases both parties must be supposed to be cognizant of that well-known rule, these cases may, we think, be more properly classed under the rule above enunciated, as to cases under known special circumstances, because there both parties may reasonably be presumed to contemplate the estimation of the amount of damages according to the conventional rule.

Now, in the present case, if we are to apply the principles above laid down, we find that the only circumstances here communicated by the plaintiff to the defendant, at the time the contract was made, were, that the article to be carried was the broken shaft of a mill, and that the plaintiff was the miller of that mill. But, how do these circumstances show reasonably that the profits of the mill must be stopped by an unreasonable delay, in the delivery of the broken shaft by the carrier to the third person? Suppose the plaintiff had another shaft in his possession, put up or putting up, at the time, and that he only wished to send back the broken shaft to the engineer who made it, it is clear that this would be quite consistent with the above circumstances, and yet the unreasonable delay in the delivery would have no effect upon the intermediate profits of the mill. Or, again, suppose that at the time of the delivery to the carrier the machinery of the mill had been in other respects defective, then, also, the same results would follow. Here it is true that the shaft was actually sent back to serve as a model for a new one, and that the want of a new one was the only cause of the stoppage of the mill, and that the loss of profits really arose from not sending down the new shaft in proper time, and that this arose from the delay in delivering the broken one to serve as a model. But it is obvious that in the great multitude of cases of millers sending off broken shafts to third persons by a carrier, under ordinary circumstances, such consequences would not in all probability have occurred, and these special circumstances were here never communicated by the plaintiff to the defendant. It follows, therefore, that the loss of profits here cannot reasonably be considered such a consequence of the breach of contract as could have been fairly and reasonably contemplated by both the parties when they made this contract; for such loss would neither have flowed naturally from the breach of this contract in the great multitude of such cases occurring under ordinary circumstances, nor were the special circumstances, which, perhaps, would have made it a reasonable and natural consequence of such breach of contract, communicated to or known by the defendant. The judge ought, therefore, to have told the jury, that, upon the facts then before them, they ought not to take the loss of profits into consideration at all in estimating the damages. There must, therefore, be a new trial in this case.

Rule absolute.

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PETO v. REYNOLDS.

January 24, 1854.

*Bill of Exchange — Promissory Note — Drawee — Acceptance —
Promise — Ratification — Taunton's Reports, Vol. 8.*

Semble, that an instrument drawn in the form of a bill of exchange, but without the name of a drawee, is void as a bill of exchange.

If this be so, the case of *R. v. Hawkes*, 2 Moo. C. C. 60, was wrongly decided, and *quære* of *Gray v. Milner*, 8 Taunt. 739.

A party gave the following instrument: —

“ Cameroons, September 3, 1852.

“ Exchange for £200 0 0.

“ At sight of this my third of exchange, the first and second of the same tenor and date being unpaid, please to pay to S. M. P., Esq., or order, the sum of two hundred pounds sterling, value received, and place the same, as by letter of advice of the 3d September, to the account of A. R.”

Across this was written, in the handwriting of A. R.,

“ Accepted, S. R., Esq., Shin-lane, Bedminster, Bristol : ” —

Held, per curiam, that assuming that this instrument was void as a bill of exchange, still, if it were shown that the person whose name was written across it had promised to pay the amount, and so ratified the act of the drawer, he would be liable on that promise.

Per Alderson, B., and Martin, B., that in such case the instrument would be a promissory note.

Per Parke, B., the 8th volume of Taunton's Reports is of apocryphal authority.

THE first count of the declaration alleged that one Alfred Righton, on the 3d September, 1852, in parts beyond the seas, at Cameroons, Africa, made his bill of exchange in writing, then overdue, in three parts, and directed the same to the defendant, and by that his third of exchange requested the defendant, at sight of that his third of exchange, the first and second of the same tenor and date being unpaid, to pay to the plaintiff or order the sum of 200*l.* sterling, for value received; that Alfred Righton delivered the said third part to the plaintiff, and the defendant had sight of and accepted that third part, but did not pay the bill, &c. The second count alleged that the defendant, by his promissory note, then overdue, promised to pay the plaintiff or order the sum of 200*l.*, for value received, but did not pay the same, &c. There was also a count on an account stated. The defendant pleaded to the first count by traversing the acceptance of the bill of exchange; to the second, by traversing the making of the promissory note; and to the common count, never indebted. At the trial, before Talfourd, J., it appeared that the plaintiff was treasurer of a foreign missionary society, and the defendant an African merchant, residing at Bedminster, in the city of Bristol. The plaintiff was, likewise, registered owner of a ship called *The Dove*, in reality the property of that society, and the defendant was owner of one called *The Mary*, commanded by Alfred Righton. In September, 1852, these vessels being at Cameroons, in Africa, Righton purchased *The Dove* from

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one of the missionaries connected with the society, a portion of the purchase-money being paid in cash, and the rest by the following instrument, on which the present action was brought :—

“ Cameroons, September 3, 1852.

“ Exchange for £200 0 0.

“ At sight of this my third of exchange, the first and second of the same tenor and date being unpaid, please to pay to S. M. Peto, Esq., or order, the sum of two hundred pounds sterling, value received, and place the same, as by letter of advice of the 3d September, to the account of Alfred Righton.”

Across this was written, in the handwriting of Righton, “Accepted, Samuel Reynolds, Esq., Shin-lane, Bedminster, Bristol.” The second and third counts having been abandoned, it was objected by the defendant’s counsel that the first could not be supported, as the above instrument was not a bill of exchange, and the judge reserved leave to move to enter a verdict on the point. Evidence was then adduced, on the part of the plaintiff, of a promise by the defendant to pay the amount of that instrument, and the jury found a verdict for the plaintiff on that count.

M. Smith, in Michaelmas term, obtained a rule to enter a verdict accordingly, and also for a new trial, on the ground that the verdict was against evidence.

Kinglake, Sergt., and *Barstow*, showed cause. The point raised in this case is a very important one. It is objected that the instrument sued on is not a bill of exchange for two reasons, both of which are unfounded : first, that every bill of exchange must be addressed to some particular person ; and, secondly, that this document bears no such address. First, where indeed an instrument professing to be a bill of exchange is addressed to some particular person, it cannot be accepted by any one else, but it is otherwise where the instrument bears no address, for then any person who accepts it is estopped from disputing that he is the person contemplated by the drawer. It is a principle of English law that every instrument must, if possible, be construed so as to have some effect, and accordingly there are instances in which certain documents may be treated either as bills of exchange or promissory notes. *Edis v. Bury*, 6 B. & Cr. 433; *Shuttleworth v. Stephens*, 1 Camp. 407. In Story on Bills of Exchange, s. 58, also, it is stated : “ If a bill is drawn upon A, B, and C, it may be accepted by A and B only, and if so it will bind them as acceptors ; and it will be no variance to state in the declaration that it was drawn on them without reference to C.” In *Gray v. Milner*, 8 Taunt. 739, where an instrument was drawn, payable to the drawer, or his order, at a particular place, without being addressed to any person by name, and was afterwards accepted by the person residing at the place where it was made payable, it was held that the acceptor could be sued on it as a bill of exchange.

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[PARKE, B. I know enough privately about the 8th volume of Taunton's Reports, to know that it is an apocryphal book.]

The report of the case in 3 B. Moo. 90, agrees.

[MARTIN, B. The case is also mentioned in 2 Stark. 336.¹]

In *R. v. Hawkes*, 2 Moo. C. C. 60, a party was indicted for uttering a forged acceptance on a bill of exchange, as follows : —

“ Birmingham, August 9, 1837.

“ £20. — Two months after date pay to my order the sum of twenty pounds for value received. EDWARD HAWKES.

“ General provision warehouse, baker, &c., Unett-street, Well-street, Hockley.”

On which was written this forged acceptance : —

“ Accepted. Payable at Messrs. Gillett and Tawney, bankers, Banbury. WILLIAM SELLERS.”

Bosanquet, J., before whom the case was tried, thought that the writing upon the instrument purported to be an acceptance by Sellers, as drawer of the bill, and if not, that it was an acceptance for the honor of the drawer; and the prisoner was sentenced to imprisonment and hard labor for two years. The question was, however, reserved whether the above instrument, not being addressed to any person as drawee, was properly described as a bill of exchange; and was so held by all the judges, except Park, J., and Littledale, J., and Bolland, B., who were absent, and Patteson, J., and Coleridge, J., and Parke, B., who dissented. In *R. v. Smith*, 2 Moo. C. C. 295, a party was indicted for uttering this instrument.

“ Bristol, February 17, 1843.

“ £150. — Three months after date pay to the order of Mr. Smith the sum of 150*l.* for value received, as advised by the Bristol Old Bank. HENRY BUSH AND CO.

“ At Messrs. Prescott, Grote, and Co., bankers, London.”

Indorsed by S. S. Smith, and several others.

Rolfe, B., who tried the case, doubted if this was a bill, there being no drawee or acceptor; but the point being reserved, it was held a bill of exchange by all the judges, with the exception of Alderson, B., Patteson, J., and Coleridge, J., who were absent. In *Davis v. Clarke*, 1 Car. & K. 177, it was held by Parke, B., at Nisi Prius, that a bill directed in blank may be accepted by anybody, and be a good bill, but if directed to a particular person, it cannot be accepted by any other person except for honor; and he mentioned that it was so held

¹ That is, at an anterior step of the cause.

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in a criminal case in the Exchequer Chamber. The plaintiff having been nonsuited, a rule was obtained to set aside the nonsuit, which, after argument, was discharged. 6 Q. B. 16. Lord Denman, C. J., in delivering judgment, says: "There is no authority, either in the English law or the general law merchant, for holding a party to be liable as acceptor upon a bill addressed to another;" and Patteson, J., thinks that *Gray v. Milner* "may be considered as having been decided on the ground that the acceptance was not inconsistent with the address, so that the acceptor might be deemed to have admitted himself to be the party addressed."

[ALDERSON, B. Suppose two persons, each in ignorance of the other, promised to pay an unaddressed bill, which of them is to be treated as the acceptor?]

When a reward is advertised for the detection of offenders, the offer is made to whoever will give information; but when a particular party has given the required information, a contract is created between him and the advertiser; and in *R. v. Snelling*, 22 Eng. R. 597, it was held that an indictment lies for forging an order for the payment of money not addressed to any one.

[PARKE, B. That was not the case of a bill of exchange.]

Secondly, assuming an address to be requisite to a bill of exchange, this instrument is addressed to "Samuel Reynolds, Esq.," for the word "accepted" before his name may be rejected. Such a direction is no doubt in an irregular form, but that cannot affect the validity of the instrument.

Smith and Prideaux, in support of the rule. It is quite true that the present question is one of very general importance. According to the argument of the other side, on the first point, if A. B. were to write on a piece of paper, "Pay to my order 100*l.* at sight," that becomes a bill of exchange, and if C. D. were to write his name across that, he might be sued as acceptor of it. But the notion that a bill of exchange can be valid without an address, is at variance with the law merchant, as understood in every country; and in the English law it is held that a bill of exchange can only be accepted by the person to whom it is addressed, except where it is accepted for his honor; *Polhill v. Walter*, 3 B. & Ad. 114; *Jackson v. Hudson*, 2 Camp. 447; *Davies v. Clarke*, 6 Q. B. 16, per Coleridge, J.; and the form of pleading alleges that the defendant made his bill of exchange in writing, and directed the same, &c. A contrary rule would be productive of great uncertainty, for a bill of exchange passes through the world as a negotiable instrument, the great merits of which are that every one can understand it, and that it carries with it certain defined rights and privileges.

[ALDERSON, B. It is called a letter of request; did any one ever hear of a letter without an address?]

PARKE, B. How could you protest for non-acceptance?]

The only authority really at variance with this is *R. v. Hawkes*, but that case was not argued, and three of the judges dissented from the remaining six. *Gray v. Milner*, stands on the very extremity of the

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law; and the case of a placard is widely different, for it is not a negotiable instrument within the law merchant. Secondly, as to the argument that the writing across this instrument may be taken as its address, that writing is on a part of the bill appropriated by usage to the acceptance. The word "accepted," has an acknowledged meaning, and refers to a past act done, not to any thing future.

POLLOCK, C. B. We all think there ought to be a new trial in this case; and under those circumstances, I shall abstain from expressing any opinion upon the question of law that has been discussed in the argument. It will be sufficient to say that there are some cases to be found, without overruling which we could not very well say that the instrument here sued on is not a bill of exchange, and there certainly have been suggestions at the bar as to the nature of those instruments which, if not incorrect, would show it not to be such. I, however, abstain, as I have said, from expressing any opinion on that question, as the parties will have an opportunity of putting it on the record when the new trial shall take place, and it may then be argued possibly with more light in point of fact than exists now, for it may be that the jury at the next trial will take a view of the case which may render the decision of it unnecessary. As, therefore, there undoubtedly are conflicting cases, I am desirous of expressing no opinion disparaging a conclusion at which, in *R. v. Hawkes*, six out of nine judges, of which six my brother Alderson, now present, must have been one, arrived. It is true, that conclusion was come to without hearing argument or the judges publicly announcing their opinion; but still, it was in a case where the liberty of a man for some considerable period was at stake; for the real question before them was whether a sentence of two years' imprisonment was to be carried into effect or not.

PARKE, B. I concur in thinking there ought to be a new trial, and the question which has been agitated may then be put on the record. I agree with my Lord Chief Baron, that it will be more proper not to express any opinion in contradiction to *R. v. Hawkes*; but then it is not accurate to say that there are other cases to the same effect; for, in all the others relied on, there is not one in which there was not enough on the face of the bill to designate the drawee, either by name or description. With every respect for the judges by whom that case was decided, it appears to me not to be of so great authority as if their decision had been given in the presence of the public, after argument, and with the reasons assigned for their judgment. On the point itself, I should have no doubt that the law merchant requires a drawer and a drawee to every bill of exchange, and the inconveniences of having no drawee are so great, that they would break down all the advantages of these instruments.

Then there is another question, but of a less doubtful nature, for on it we have no opinion of judges. I do not see how you can construe an acceptance to be an address. Still, however, although this instrument could not be treated as a bill of exchange, as having no drawee,

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yet as, on its face, it is a promise to pay the amount of the bill, if it has been ratified by the defendant, that would be an acknowledgment of the authority of Righton in signing it on his behalf, and he would be accountable for the amount. All that, however, is a matter for inquiry.

ALDERSON, B. I concur in thinking this verdict extremely unsatisfactory. As to the question whether this instrument is a bill of exchange, there is the case of *R. v. Hawkes*, before the nine judges, of whom I was one myself, in the affirmative; but the argument of to-day has convinced me that I was wrong on that occasion. That case was discussed on the supposition that *Gray v. Milner*, governed it, and the circumstance was not adverted to, that in *Gray v. Milner*, the bill was directed to a certain house, and therefore, might be considered as addressed to some one, and as a party there afterwards promised to pay the bill, he thereby admitted that he was the drawee intended by the drawer. Even that, however, is at the extremity of difficulty; but my conscience acquits me with respect to *R. v. Hawkes*, for I am convinced the man deserved the two years' imprisonment he got, as he clearly obtained money under a false pretence.

MARTIN, B. I agree in thinking this a very unsatisfactory verdict, and on the other question I quite concur with my brothers Parke and Alderson. It seems to me essential to a bill of exchange that there be a drawee, otherwise there would be inconveniences without end. And if I am not bound by *Gray v. Milner*, which is the decision of a court of coördinate jurisdiction, I should doubt extremely if this were a bill of exchange. That case, however, is not like the present, and, in *Davis v. Clarke*, is said by Patteson, J., to be at the very extremity of the law. But assuming that the defendant here did what he is said to have done, I think this instrument is a promissory note. There is a principle of law, that if a man makes a contract for another, and that other afterwards adopts the contract, it is the same as if he had made it himself. I also agree with my brother Parke, that it is impossible to view the writing across this document in any other light than as an acceptance.

ALDERSON, B. I quite agree in thinking this a promissory note.

Rule absolute.

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STEVENS v. THE MIDLAND COUNTIES RAILWAY COMPANY.

June 22, 1854.

Corporation — Malicious Prosecution.

Quære, whether an action for a prosecution instituted maliciously and without reasonable and probable cause, is maintainable against a corporation?

The prosecuting a person with any other motive than that of bringing a guilty party to justice is a malicious prosecution in law; as, for instance, where a prosecution is instituted against a person with the view of terrifying parties from the commission of some prevalent offence. Per ALDERSON, B., and MARTIN, B.

THIS was an action for maliciously, and without reasonable and probable cause, prosecuting the plaintiff for stealing a tarpaulin belonging to The Midland Counties Railway Company, a body incorporated by act of parliament, and was brought against that body and one Landor, who, acting as their servant, had instituted the prosecution in question. At the trial, a great deal of evidence was adduced, part of which went to show that the prosecution of the plaintiff had been instituted not so much from a belief in his guilt, as to terrify others, many depredations on the property of the company having been committed by parties unknown. The judge left the question of reasonable and probable cause to the jury, who found for the plaintiff; leave being reserved to move to enter a verdict for either or both defendants on the following grounds: first, that an action for malicious prosecution is not maintainable against a corporation; secondly that Landor was not proved their agent in instituting the prosecution; and, thirdly, that there was no evidence of malice even as against him.

Keating, in Easter term, obtained a rule accordingly.

Whateley and *Gray* showed cause. First, as to Landor, there was evidence that in this prosecution he acted not only without reasonable and probable cause, which would in itself be sufficient to maintain the action, but that he was actuated by malice. Secondly, although there is no case in point, the company are, on principle, liable in this sort of action. A corporation is liable in every instance where they have committed any violation of social duty, as appears from several authorities. In *The Eastern Counties Railway Company v. Broom*, 6 Exch. 314, s. c. 2 Eng. Rep. 406, it was held that trespass lies against a corporation aggregate for an assault committed by their servant authorized by them to do the act, or if done without their authority, afterwards ratified by them. There, a case having been cited from the Year Books, that a corporation cannot beat another, or do treason, or felony in their corporate character, Maule, J., interposed: "That must be taken to mean that a corporation is not liable *criminaliter* for such acts;" and Wightman, J., afterwards adds: "If a cor-

poration can hold realty, why may not they commit an assault by turning a trespasser off their land? Their answer to an action would be, that, although they committed the assault, it was committed in the defence of their property." A corporation aggregate may be indicted not only for a misfeasance, *Regina v. The Birmingham Railway Company*, 3 Q. B. 223, but also for a nonfeasance, *Regina v. The North of England Railway Company*, 9 Q. B. 315, and is liable in trespass *quare clausum fregit*. *Maund v. The Monmouthshire Canal Company*, 4 Man. & G. 452.

[PLATT, B. If this objection be well founded, it might have been taken in *Chilton v. The London and Croydon Railway Company*, 16 M. & W. 212.]

Very serious consequences would ensue were the law otherwise, for a corporation might, through malicious motives, do the most lawless and oppressive acts against individuals, and yet be irresponsible.

[ALDERSON, B. No. If a corporation authorize an unlawful act they are responsible for it; but that is a different thing from their having a *malus animus*. If, for instance, the directors of a company knowingly and maliciously direct the prosecution of an innocent man, they are personally responsible for it, because the company cannot be supposed to have invested them with authority for such a purpose.]

In *Sears v. Lyons*, 3 Stark. 317, where an action was brought for throwing poisonous matter upon the plaintiff's premises in order to poison his poultry, it was held by Lord Tenterden, that the jury, in estimating the damages, might consider, not merely the amount of damage sustained, but the intention with which the act was done, if done for insult or injury: and in trespass *quare clausum fregit*, the jury may give substantial damage, though no actual injury is caused. *Merest v. Harvey*, 1 Marsh. 139.

[ALDERSON, B. Even if this sort of action were maintainable against the company, I do not see any evidence against them, for they have constituted Landor their agent to act only lawfully, not unlawfully, for them. As far as Landor is concerned we will hear the other side.]

Keating, Huddleston, and Powell, contra. It is not disputed, that if a corporation direct their officer to do a legal act, he may so conduct himself in the execution of it as to render himself liable to an action. In this respect the law is the same as in the case of a private individual and his agent. But where, as here, the principal and agent are joined as defendants, in an action, the judge ought to tell the jury, that if, in doing the unlawful act complained of, the agent was acting under the direction of his principal, without malice *dehors* that direction, he is not accountable. Then this action is not sustainable without proof of actual malice. In an action for a malicious arrest, the question of malice must be put to the jury, who though at liberty are not bound to infer it from want of reasonable and probable cause. *Mitchell v. Jenkins*, 5 B. & Ad. 588. In deliv-

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ering the judgment of the court in *Bromage v. Prosser*, 4 B. & Cr. 255, Bayley, J., says: "'Malice,' in common acceptation, means ill-will against a person, but in its legal sense it seems a wrongful act, done intentionally, without just cause or excuse."

ALDERSON, B. The first question that arises here is, whether this verdict was against the weight of evidence — was there evidence for the jury which might reasonably lead them to the conclusion that the prosecution of the plaintiff by Landor was done by him without reasonable and probable cause, and maliciously? And I own I am not dissatisfied with the verdict in that respect. It appears to me that not only was there abundant evidence from which they might have inferred the want of reasonable and probable cause, but that when we come to look at Landor's conduct towards the plaintiff in making the charge, there was evidence of malice to go the jury; and although there are circumstances from which the jury might believe that he had no personal spleen against the man, yet that is not essential; for any motive other than the simple one of wishing to bring a guilty party to justice is a malicious motive in law.¹

As to the other part of the rule, I am of opinion that an action of this kind cannot be maintained against a corporation, for such an action requires a motive in the mind of the party bringing it, and a corporation has no mind to have a motive in.

PLATT, B. I think there was no case against the corporation here, though I do not say that cases may not arise in which a corporation might have a motive. But as to Landor, not only did he institute this prosecution without reasonable and probable cause, but I think there was evidence of malice, actual malice, in him, besides the malice implied from want of reasonable and probable cause. As to the argument about agency, I do not understand it. Suppose a man employs another to prosecute a third, both principal and agent knowing that there is no pretence for the prosecution, are they not both liable? Or is it enough for the agent to say, "I obeyed the commands of my principal?" If he is the willing agent to do what is illegal, and lends himself to do it, he is equally responsible. As applied to the present case, the argument is one of the hollowest I ever met; for it is argued, first, that the company are not responsible because they can have no mind, and secondly, that the agent is not responsible, because he obeyed the command of the company, and therefore no one is responsible for a wicked and scandalous act.

MARTIN, B. I also think that this rule as against Landor should be discharged. There was no reasonable or probable cause of any kind for this prosecution. Moreover, the evidence shows that the

¹ In *Plummer v. Gheen*, 3 Hawks, 66, it was held that prosecuting a person really guilty, however malicious the motive, would not render the prosecutor liable to an action for malicious prosecution.

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object in instituting it was not to punish for a crime, and I agree with my brother Alderson that any other motive is a malicious one, sufficient to maintain this kind of action. But even were this otherwise, I think there is evidence of express malice against him. As to the company, the rule must be absolute. It is not necessary to give any opinion whether such an action as this can be maintained against a corporation;¹ for, even supposing this company not a corporation at all, I do not think they could be liable for the act of their servant acting as was done here, for clearly there was no malice in them.

Rule absolute as to the company, and discharged as to Landor.

THE ATTORNEY-GENERAL v. OTTO RADLOFF.

June 14, 1854.

Competency of Witness — Revenue Laws — Information.

The second section of the 14 & 15 Vict. c. 99, enacts that "on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or other proceeding in any court of justice, or before any person having by law, or by consent of parties, authority to hear, receive, and examine evidence, the parties thereto, and the persons in whose behalf any such suit, action, or other proceeding may be brought or defended, shall, except as hereinafter excepted, be competent and compellable to give evidence, either *viva voce* or by deposition, according to the practice of the court, on behalf of either or any of the parties to the said suit, action, or other proceeding." The act then contains certain exceptions, and among others, the following in section 3: "But nothing herein contained shall render any person who in any criminal proceeding is charged with the commission of any indictable offence, or any offence punishable on summary conviction, competent or compellable to give evidence for or against himself or herself:" —

Held, per CURIAM, first, that if the second section had stood without the subsequent exceptions, its language would probably include every possible case, civil or criminal, that could present itself in a court of justice; but would certainly include informations by the Attorney-General for breaches of the revenue laws.

Secondly, that the words "in any criminal proceeding" override the whole of the above enactment in the third section.

In an information by the Attorney-General for a violation of the revenue laws, punishable by information or summary conviction at the discretion of the crown, the defendant was tendered as a witness on his own behalf: —

Held, per PLATT, B., and MARTIN, B., that he was rendered a competent witness by the 14 & 15 Vict. c. 99. Per POLLOCK, C. B., and PARKE, B., *contra*.

The being concerned in unshipping goods prohibited to be imported into the United Kingdom; and the being concerned in importing foreign goods, contrary to statute, are not indictable offences.

¹ In *McLellan v. Cumberland Bank*, 24 Maine, 566, it was said, it might well be doubted whether corporations aggregate could be implicated by the acts of their servants in transactions, in which malice must be found to sustain an action against the company therefor.

The Attorney-General v. Radloff.

THIS was an information by the Attorney-General, dated as of Trinity term, 16 Vict. The first count alleged that the defendant, after the 4th August, 1845, &c., to wit, on the 16th September, 1852, did assist and was otherwise concerned in the unshipping of certain foreign goods, to wit, 3,291 lbs. weight of foreign tobacco-stalk flour, of great value, to wit, 575*l.* 18*s.* 6*d.*, the said goods being prohibited to be imported into the United Kingdom, contrary to the form of the statute, &c. The second count alleged that the defendant, after the 1st August, 1849, &c., to wit, on the 16th September, 1852, was concerned in importing and bringing into the United Kingdom *certain other foreign goods which were then and there, under and by virtue of an act of parliament made and passed in a session of parliament holden in the eighth and ninth years of the reign of her Majesty, intituled "An Act for the general regulation of the customs," prohibited to be imported into the United Kingdom, that is to say*, divers, to wit, 3,291 lbs. weight of other foreign tobacco-stalk flour, of great value, to wit, 575*l.* 18*s.* 6*d.*, contrary to the form of the statute, &c. The third count was similar to the second, omitting the words in italics. Each of the counts concluded as follows: "Whereby and by force of the statutes in that case made and provided, the said Otto Radloff hath for his said offence forfeited and lost the sum of 1,727*l.* 15*s.* 6*d.*, &c., which said sum, being the treble value of the said goods, the Attorney-General avers that the commissioners of her Majesty's customs have elected to be sued for in this behalf, in lieu and instead of the penalty of 100*l.*, &c.;" and the information concluded thus: "Wherefore her Majesty's said Attorney-General, on behalf of her said Majesty, prayeth the consideration of this court in the premises, and that the said several sums of money so respectively forfeited to her said Majesty by the said Otto Radloff, in the behalf aforesaid, may be adjudged to her said Majesty, and that the said Otto Radloff may appear here in court to answer concerning his said several offences, and also concerning the said several sums of money." To the whole information the defendant pleaded "not guilty." At the trial, before Pollock, C. B., after the case for the crown had closed, the defendant's counsel proposed to call the defendant as a witness for the defence. The counsel for the crown objected that he was not a competent witness, and the judge, ruling in accordance with this view, rejected his testimony. A verdict having been found for the crown.

Shee, Sergt., in Easter term, on the 20th April, obtained a rule for a new trial, on the ground that the witness had been improperly rejected. This rule was argued in that term, on the 10th and 11th May, before Pollock, C. B., Parke, B., Platt, B., and Martin, B.; when

The *Attorney-General*, *Watson*, and *Wilde*, showed cause; and

Shee, Sergt., *W. M. Best*, and *M'Niven*, were heard in support of the rule.

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We forbear giving the arguments ; but the following statutes and authorities were referred to : 46 Geo. 3, c. 37 ; 5 & 6 Will. 4, c. 50, s. 100 ; 6 & 7 Will. 4, c. 76, ss. 6, 7 ; 6 & 7 Vict. c. 85 ; 8 & 9 Vict. cc. 16, 18, 20 ; 8 & 9 Vict. c. 86, s. 63 ; 8 & 9 Vict. c. 87, ss. 46, 51, 82, 88, 103–105, 107 ; 14 & 15 Vict. c. 99, ss. 1–6 ; 16 & 17 Vict. c. 83 ; 16 & 17 Vict. c. 107 ; 1 Bl. Com. 262 ; 4 Bl. Com. 5 ; 4 Steph. Com. 73, 3d ed. ; Mann. Exch. Plead. (Revenue Side,) 193, note (q,) 201, 231 ; 1 Gr. Russ. 49 ; Mitf. Ch. Plead. 359 *et seq.*, 5th ed. ; Tayl. Ev. § 1071 ; Bateman's Excise Laws, 59, note (n) ; 11 Rep. 70, 71 ; 3 Bulst. 50 ; Sir J. Friend's case, 13 How. St. Tr. 17, per Treby, C. J. ; *The Attorney-General v. Weeks*, Bunb. 223, 224 ; *Rex v. Preston-on-the-Hill*, Cas. t. Hardw. 251, per Lord Hardwicke ; *Cawthorne v. Campbell*, 1 Anst. 214 ; *The Attorney-General v. Bowman*, 2 B. & P. 532, note ; *The Attorney-General v. Freer*, 11 Price, 183, per Graham, B. ; *Ashford v. Thornton*, 1 B. & Al. 405 ; *The Attorney-General v. Kenifick*, 2 M. & W. 715 ; *The Attorney-General v. Bradbury*, 7 Exch. 97 ; *Cooke v. Turner*, 14 Sim. 218 ; *Regina v. Garbett*, 1 Den. C. C. 236 ; 2 Car. & K. 474 ; *Fisher v. Ronalds*, 17 Jur. 393, s. c. 16 Eng. Rep. 417 ; and an unreported case of *The Attorney-General v. Levy*, June, 1840, where, after judgment for the crown by default, on an information of intrusion, the crown having elected not to proceed for mesne profits, the court imposed on the defendant a fine, to be paid within a week.

Cur. adv. vult.

And now the barons, being unable to agree in opinion, proceeded to give judgment separately, thus :—

MARTIN, B. This is an information for the recovery of penalties for smuggling tobacco, under the 51st and 82d sections of statute 8 & 9 Vict. c. 87. The case was tried before the Lord Chief Baron at the sittings after last Hilary term, when the defendant was tendered as a witness on his own behalf, and was rejected by the learned judge. A rule for a new trial was granted on the point, and the case has been argued before us.

The question depends upon the construction of the 2d and part of the 3d sections of statutes 14 & 15 Vict. c. 99.

The 2d section enacts, that “ on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or other proceeding in any court of justice, or before any person having by law, or by consent of parties, authority to hear, receive, and examine evidence, the parties thereto, and the persons in whose behalf any such suit, action, or other proceeding may be brought or defended, shall, except as hereinafter excepted, be competent and compellable to give evidence, either *viva voce* or by deposition, according to the practice of the court, on behalf of either or any of the parties to the said suit, action, or other proceeding.” A very long argument was addressed to us to show that the present case does not fall within this section. I believe, however, we are all clearly of opinion that it does. For my own part, I cannot conceive what

general words the legislature could have used to include the present case if these do not. "Any suit, action, or other proceeding in any court of justice" must surely include an information at the suit of the Attorney-General for penalties under the 82d section of the act first named.

The 3d section contains the exception, and provides that nothing in the act shall "render any person who in any criminal proceeding is charged with the commission of any indictable offence, or any offence punishable on summary conviction, competent or compellable to give evidence for or against himself, or shall render any person compellable to answer any question tending to criminate himself." By the 82d section, above mentioned, the penalties sought to be recovered in the present information are recoverable by action of debt, bill, plaint, or information, in the name of the Attorney-General, or of some officer or officers of the customs, or by information before two justices of the peace; they are, therefore, recoverable on a summary conviction. That the breach of law charged in the information is not an indictable offence is clear; the same section of the statute which enacts the offence enacts the penalty as the consequence, and in such cases it is by law the only consequence, and the offence is not the subject of an indictment. *Couch v. Steel*, 23 Law J. Rep. (N. S.) Q. B. 121; s. c. 24 Eng. Rep. 78.

But it was argued that this is a criminal proceeding, wherein the defendant is charged with an offence punishable on summary conviction; and we are all agreed that the only question is, whether the information in the present case is a criminal proceeding within the true meaning of the 3d section. I think it is not. There are many crimes, properly so called, which are liable to be punished on summary conviction. But there are a vast number of acts which in no sense are crimes, which are also so punishable; such, for instance, as keeping open public-houses after certain hours, and a variety of breaches of police regulations which will readily occur to the mind of any one. The bringing tobacco into this kingdom is of itself a perfectly innocent act, but the requirements of the public revenue, which induce the legislature to impose a very high duty upon the article, probably render it matter of necessity that the bringing it into the kingdom without payment of the duty should be subjected to a penalty. But this cannot affect or alter the intrinsic and essential nature of the act itself, and it seems to me that it cannot be denominated a "crime," according to the ordinary and common usage of language and the understanding of mankind. The proper meaning of "crime" is an indictable offence. The question has frequently arisen, whether an information at the suit of the Attorney-General for penalties for smuggling be a criminal proceeding. I believe it has invariably been considered not to be so. One test, and a very obvious one is, whether in such a case the character of the defendant be admissible in evidence. It has been decided that it is not. In criminal cases evidence of the good character of the accused is most properly and with good reason admissible in evidence, because there is a fair and just presumption that a person of good character would

not commit a crime ; but in civil cases such evidence is with equal good reason not admitted, because no presumption would fairly arise, in the very great proportion of such cases, from the good character of the defendant that he did not commit the breach of contract or of civil duty alleged against him. But it is not admissible in such cases as the present, and the reason given is, (as indeed it must be,) that the proceeding is not a criminal proceeding, but in the nature of a civil one, and that therefore the good character of the defendant would afford no just ground of presumption that he had not done the act in respect of which the penalty is imposed. It therefore seems to me that the true construction of the 3d section is, that when the act in respect of which the summary conviction is sought to be obtained is really a crime, the accused person is neither competent nor compellable to give evidence, either for or against himself, but that when the act is not of a criminal nature, he is so competent, and may lawfully be examined.

The judgment, which has been arrived at by the learned Chief Baron and Baron Parke, seems to me to put the admissibility or non-admissibility of the defendant upon a very unsatisfactory ground; that is to say, not upon the nature of the proceeding itself, but upon the collateral and apparently not very relevant circumstance, whether the act charged in the information could also be the subject of a summary conviction. I cannot think that it was intended by the legislature to make this the test of the admissibility. But there seems to me to be a still stronger objection to the conclusion which they have arrived at. By the 82d section of the 8 & 9 Vict. c. 87, these penalties are recoverable by an action of debt. Now, that is clearly not a criminal proceeding, and if the Attorney-General sued in debt, the defendant would undoubtedly be admissible; and can it be that in a legal proceeding to recover the same penalty, the right of the defendant, to be examined as a witness on his own behalf, is to depend upon whether the Attorney-General thinks fit to adopt the action of debt or the information — the power to use either at his option being given to him by the same section of the act of parliament? In my judgment, the defendant's right cannot be affected by the form of proceeding which the Attorney-General thinks proper to use.

A variety of reasons were submitted to us to show why the defendant should not have been rendered admissible by the legislature. Several of them seem to me not to be well founded. It was said, that there was no reciprocity, and that the admission of the defendant to be a witness would be one-sided. But this is not so; it would be perfectly idle to suppose that the Attorney-General himself could know any thing which would be evidence in such a case, and in reality all persons whatever, who know any thing of the transaction, are admissible as witnesses against the defendant. It was also said, that if the Attorney-General called the defendant as a witness, he might refuse to answer any question whatever. This is quite true: but supposing him to be called and refuse to answer, there can be no doubt that, if there was the slightest evidence in the case, the practical consequence would be that this his refusal would lead to an immediate

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verdict against him. It was also said that it would be dangerous to admit him to be examined, on the ground of the temptation to commit perjury. But this proves too much, for there is no greater temptation of this kind in the case of an information at the suit of the Attorney-General, than in numerous other classes of cases in which defendants are undoubtedly admissible.

On the whole, I am of opinion that an information at the suit of the Attorney-General, for penalties for smuggling under the statute 8 & 9 Vict. c. 87, is not a criminal proceeding, and that the true construction of the 3d section of the 14 & 15 Vict. c. 99, upon which the question entirely depends, is to exclude defendants as witnesses in direct proceedings for a summary conviction, when the act charged is a crime. This, I have been informed, is the construction which has been put upon the section by several of the very learned persons who preside at the metropolitan police courts, and in my judgment it is the correct one.

The rule ought, therefore, to be made absolute.

PARKE, B. In this case, on the trial of an information filed by the Attorney-General, for the recovery of the treble value of some smuggled tobacco, the defendant was offered as a witness, on his own behalf, and rejected by the Lord Chief Baron.

A motion for a new trial was made last term, and argued on the last two days of the term, and time was taken to consider the question, which is of importance and some difficulty. The difficulty, not an uncommon one, is, to ascertain the meaning of the words used by the legislature. Probably the framers of the act never had the particular class of cases — informations for penalties, or actions for them — in their contemplation. We must follow, however, the ordinary rules of construction of the language used by the legislature, and so doing, it seems to me that they have used sufficient words to prohibit the defendant from being a witness, and, therefore, I think the decision of the Lord Chief Baron, though I have had considerable doubt about it, was right.

By the act 14 & 15 Vict. c. 99, upon which this question depends, it is provided by section 1 that the proviso in the 6 & 7 Vict. c. 85, s. 1, that no nominal or real party to a suit, action, or proceeding, shall be competent, is repealed; and then, by the 2d section, it is enacted, that on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or other proceeding in any court of justice, or before any person having by law, or by consent of parties, authority to hear, receive, and examine evidence, the parties thereto, &c., shall, except as thereafter excepted, be competent and compellable to give evidence, either *viva voce* or by deposition, according to the practice of the court, on behalf of either or any of the parties to the said suit, action, or other proceeding. The exceptions are stated in the 3d and following sections. The 3d provides that nothing therein contained shall render any person who in any criminal proceeding is charged with the commission of any indictable offence, or any offence punishable on summary conviction, competent

or compellable to give evidence for or against himself or herself, or shall render any person compellable to answer any question tending to criminate himself or herself, or shall in any criminal proceeding render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband. The 4th section provides that the statute shall not apply to actions or proceedings in consequence of adultery or breach of promise of marriage. The 5th provides that nothing in the act contained shall repeal any provision in the 7 Will. 4 & 1 Vict. c. 26.

The question is as to the meaning of the 2d and 3d sections.

The words of the 2d section are certainly large enough to include every proceeding of every description in which witnesses could be examined — every proceeding, civil or criminal, or other, if there be any, which does not fall accurately within the description of criminal or civil; and unless this case is comprised within the subsequent exceptions, parties to suits and proceedings of every description, civil or criminal, are competent and compellable to give evidence for and against each other.

Then comes the question as to the meaning of the exception in the 3d section, the only one applicable to this case. Now, the first part of this exception embraces all criminal proceedings for indictable offences, proceedings by indictment, informations by the Attorney-General, informations in the crown-office, coroners' inquisitions, preliminary inquiries on charges of felonies or misdemeanors before magistrates, and every other mode by which indictable offences may be inquired into or tried. This certainly does not apply to this sort of information by the Attorney-General, for this offence is not indictable. Next, is this a criminal proceeding by which the defendant is charged with the commission of any offence punishable by summary conviction? As to its being a criminal proceeding: an information by the Attorney-General for an offence against the revenue laws, is a criminal proceeding — it is a proceeding instituted by the crown for the punishment of a crime — it is a crime and an injury to the public to disobey statute revenue law; and accordingly, the old form of proclamation, made before the trial of informations for such offences, styles these offences "misdemeanors." Is it a proceeding whereby he is charged with the commission of an offence punishable by a summary conviction? One should conjecture that the intention was to provide for proceedings before a magistrate, or commissioner, or other person having a power to convict summarily for an offence, in which proceeding he was charged with a view to a conviction for that offence. But the words are not so limited; they are large enough to embrace any criminal proceeding, whether summary or not, for any offence which might have been the subject of inquiry and conviction in a summary proceeding; and if so, the defendant was incompetent to be examined, for no sufficient reason can be assigned for making a party incompetent and not compellable to be a witness in a proceeding before a magistrate, and yet competent and compellable on a trial for the very same offence before a judge and jury. I am, therefore,

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of opinion that, in this particular case, the witness was incompetent, and was therefore properly rejected.

But the legislature have not provided for the case of an information filed by the Attorney-General for an offence against the revenue laws, which was neither indictable, nor the subject of a summary proceeding before a magistrate or other person. This is a *casus omissus* from the exception, whether accidental or designed we need not inquire, and falls within the general provision of the 2d section. In like manner, are omitted the cases of civil remedies for penalties or forfeitures, where parties are compellable and competent to give evidence; for it is no objection to their being so, that when called, any one has the privilege of refusing to answer any questions tending to criminate himself; and it is said that, as every material question would have that tendency, and every immaterial one might be rejected, the result would be that he would not be bound to answer at all. But still, he is compellable to attend and be sworn as a witness, and whether he actually gives evidence or not, depends upon his taking the objection. The very act, however, of refusing to answer, when called, would materially prejudice the defendant's case; he would stand in a very different position from that in which he is placed by a plea of not guilty. This is an evil which the legislature have not provided for, but it is not probable that it would often occur, as few plaintiffs would try the experiment of calling the defendant in a penal action. On the other hand, the defendant in all those cases not provided for by the statute, may be examined for himself, and yet not be compelled on cross-examination to answer any question tending to render him liable to the information or action; but then if he did so, his evidence would very likely not profit him at all, and the power of being examined on his own behalf would be of little avail.

All that is necessary, however, to decide this case is, that the information, being for an offence punishable on summary conviction, is within the exception in the 3d section, and, therefore, the witness was inadmissible, and this rule ought to be discharged.

POLLOCK, C. B. My learned brothers, who have preceded me in giving judgment, have, in my opinion, each of them stated correctly the question before the court. I entirely agree with my brother Martin, that all we have to consider is, what is the meaning of the 3d section of the 14 & 15 Vict. c. 99. I think it is very clear that, but for that section, the present defendant, and probably every person accused in any court whatever, of any offence whatever, would be a competent witness on his trial. Certain exceptions are, however, introduced by that section, and there can be no doubt that a person charged by the crown in a criminal court of justice with an offence, is not a competent witness.

The question, therefore, is, whether the defendant, on the present occasion, was properly rejected as a witness. The solution of this question turns upon the following inquiries. Is this proceeding by the Attorney-General, upon this sort of information in the Court of Exchequer, a criminal proceeding? Is smuggling an offence? And

is it an offence punishable on summary conviction? Because, if these three questions must be answered in the affirmative, then the present occasion is precisely within the very words of the 3d section of the 14 & 15 Vict. c. 99, as my brother Parke has just pointed out, and the witness was properly rejected.

My brother Martin thinks it matter of doubt whether this proceeding by the Attorney-General is a criminal proceeding. His opinion is that it is not, and, if that be the case, his judgment is probably correct. He seems, also, as I understood him, to think that an infraction of this branch of the revenue laws is not an offence. The conclusion to which I have come, however, is, that all the inquiries on which it appears to me the present question depends, ought to be answered in the affirmative. In the first place, I am of opinion that a proceeding in this court on the part of the Attorney-General, to recover penalties by means of an information filed by him on behalf of the crown, is a criminal proceeding. It is very true that some argument against this is furnished by the refusal of the courts to receive witnesses to character in such cases; but, on the other hand, there is the old proclamation, which is regularly made in this court, (for although some doubt was expressed during the argument whether it has been continued down to the present time, still, as far as I can learn, it has been so continued,) by which persons are invited to come forward and bring any charges they can against the defendant, for that there he stands on his deliverance, and the form runs thus, that any persons who have any misdemeanors to charge him with, are those who must come forth. Now, that sort of proclamation is exclusively used in criminal courts, and on criminal proceedings, and it appears to me that its being used in cases of this kind, outweighs the circumstance of evidence to character not being receivable in them. I am, therefore, of opinion, that this is a criminal proceeding. That it is a matter which may be inquired of and punished on summary conviction, is perfectly clear; and the only remaining question is, is it an "offence?" I should be very sorry if I could bring myself to entertain any doubt about its being such. I think it is a very grave offence against the public; and cannot distinguish, in point of either law or morals, between cheating the state and cheating a private individual. I cannot distinguish between endeavoring by concealment and fraud to prevent that from being paid which is necessary for the public service, and by similar concealment and fraud, depriving one of her Majesty's subjects of that which is his lawful right and due. It is also punishable by fine, though it is very true it is not punishable in any other way, as my brother Martin has pointed out. But, although not punishable in the ordinary way by indictment, it is punishable by fine, and the fine may be obtained on summary conviction.

In my opinion, then, this being an offence punishable on summary conviction, and the question arising in a criminal proceeding, the defendant was not a competent witness, and was very properly rejected. But as my brother Platt is of the same opinion with my

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brother Martin, and the court is therefore divided, two and two, no judgment can be pronounced, but the rule for a new trial will drop.

At a later period of the day, the following judgment was given by

PLATT, B. In the case of *The Attorney-General v. Radloff*, I was not fortunate enough to be here this morning when my learned brothers gave their opinions.

This was an information by the Attorney-General to recover penalties for smuggling tobacco, and upon the trial the defendant himself was called to be examined as a witness, whereupon the question arose whether he was competent under the late act of parliament to be so examined. He was rejected by the judge, and a motion was afterwards made for a new trial. The matter has been argued at a very considerable length, and it at last comes for the judgment of the court to be pronounced upon it, but I am sorry to say we are divided in opinion.

The acts of parliament which give rise to this question, namely, the 6 & 7 Vict. c. 85, and the 14 & 15 Vict. c. 99, were manifestly passed for the purpose of remedying what was considered an evil in or obstruction to the administration of justice, namely, the raising of objections to persons offered as witnesses. The preamble of the first of these acts shows the object the legislature had in view, and runs thus: "Whereas the inquiry after truth in courts of justice is often obstructed by incapacities created by the present law, and it is desirable that full information as to the facts in issue, both in criminal and civil cases, should be laid before the persons who are appointed to decide upon them, &c." Having stated that as the evil which was to be remedied, (for we must not forget that both these acts are remedial acts, and therefore to be construed in such a manner as to advance the remedy as much as possible,) the act goes on to enact, that "no person offered as a witness shall be excluded by reason of incapacity from crime or interest from giving evidence, either in person or by deposition, according to the practice of the court, on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or proceeding, civil or criminal, in any court or before any judge," and so forth, but that all such persons shall be competent to be examined. Now if this had stood without the proviso which afterwards follows, who could doubt that any man brought before a court of justice, under any circumstances, even a man who is indicted and on his trial for a crime, might be put into the box and examined as a witness? at least, no one could doubt that the extent of the above expressions would be quite sufficient to include the parties to a cause, as well as all other persons who had an immediate and direct interest in the victory on that occasion. But the legislature, by a subsequent proviso, guarded and excepted from the enacting part of this section the parties to the suit and those who stand in the place of parties, that is, lessors of plaintiffs, tenants of premises sought to be recovered in ejectment, landlords defending actions of replevin by means of their tenants, and all persons in whose

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immediate and individual behalf an action is brought or defended. This change in the law was found to operate beneficially, because although undoubtedly it promoted the commission of the crime of perjury to a great extent, yet it certainly on many occasions supplied juries with the means of discovering truth which they would not otherwise have possessed. Then came the second act of parliament, the 14 & 15 Vict. c. 99, passed to amend the former, which, after reciting that it was expedient to amend the law of evidence in divers particulars, begins its enacting part by striking out a great portion of the proviso to which I have referred, and says: "So much of section 1, of the act of the 6 & 7 of her present Majesty, c. 85, as provides that the said act shall not render competent any party to any suit, action, or proceeding individually named in the record, or any lessor of the plaintiff, or tenant of premises sought to be recovered in ejectment," and so forth, shall be repealed; the consequence of which is to enlarge the enacting of the former act. The present act then goes on — its 2d section enacts, "On the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or other proceeding in any court of justice, or before any person, having by law, or by consent of parties, authority to hear, receive, and examine evidence, the parties thereto, and the persons in whose behalf any such suit, action, or other proceeding may be brought or defended, shall, except as hereinafter excepted, be competent and compellable to give evidence." And then comes the 3d section, which raises the question that was mooted before the court: "But nothing herein contained shall render any person who in any criminal proceeding is charged with the commission of any indictable offence, or any offence punishable on summary conviction, competent or compellable to give evidence for or against himself, &c."

It is urged that the present information is a criminal proceeding, or at all events a proceeding for an offence punishable on summary conviction. Let us see, therefore, what the cause of this proceeding is: because it does not follow that every information by the Attorney-General is a criminal proceeding. He may proceed by way of information, and in fact declare against the defendant in trover, in debt, in ejectment; in short, in every species of civil action; and the information before us is merely a civil action for the purpose of recovering certain penalties. What, then, is a "civil proceeding," as contradistinguished from a "criminal proceeding?" It strikes me that the true test is to see if the subject-matter be of a personal character; that is, if the proceeding relates to goods or property which it is sought to recover by legal proceedings, that is a civil proceeding; but if it is one which may at once affect the defendant personally, by the imprisonment of his body in the event of a verdict of guilty being pronounced against him, as being a public offender, that is what I consider a criminal proceeding. Now, although informations of this kind by the Attorney-General may by some be considered criminal proceedings, I rather deem them in the nature of civil proceedings, and exactly like the old actions to recover penalties under the Game Laws, which, as we all remember, were civil proceedings. Let us see what the

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object of these informations is. Are they for the purpose of punishing the defendant if a verdict passes against him, as a person guilty of an offence, and immediately on conviction taking his body? No; the object is to recover money — to recover that which by law is made a debt; for by the 82d section of the 8 & 9 Vict. c. 87, the act under which the penalty here is sought to be recovered, you have this enactment: “And be it enacted, that all penalties and forfeitures incurred or imposed by this or any act relating to the customs or to trade and navigation, shall and may be sued for, prosecuted, and recovered, by action of debt, bill, plaint, or information, in any of her Majesty’s courts of record, &c. ;” and it then goes on to provide that those penalties and forfeitures may likewise be recovered by summary conviction. Would any lawyer contend for a moment — could any one say — that the action of debt here spoken of is a criminal proceeding? And if not, it must be contended that the same man who, if assailed in an action of debt, would be a competent witness by force of the 14 & 15 Vict. c. 99, would not be competent if proceeded against by information in the Exchequer, or before justices of the peace, for the very same matter — a position than which nothing can be more absurd.

For the above reasons I think that this was not a criminal proceeding, or any thing approaching to the nature of a criminal proceeding; and as the words “in any criminal proceeding” cover the whole of the 3d section of the 14 & 15 Vict. c. 99, with the exception of that portion which provides that nothing in the statute shall render any person compellable to criminate himself, I think this defendant was competent to be examined as a witness.

ALDERSON, B., (who was present in court during the delivery of this judgment,) here asked: “Can the defendant be a witness in a civil action where there is a justification for felony?”

PLATT, B., continued. If a man be indicted for an assault, he cannot be a witness on the trial, because that is a criminal proceeding, and on conviction he might at once be put in prison; but if an action for an assault be brought against him, would any one contend for a moment that he is not rendered a competent witness by this statute?

By the language of this act the legislature have, I consider, declared their intention to render parties in the situation of this defendant competent witnesses, and we are bound to carry out their intentions. If the legislature think that an incorrect state of the law, nothing is easier than for them to alter it for the future; but, as the matter stands, I think this rule ought to be made absolute, though as the court is divided, it must necessarily drop.

The rule thus falling to the ground, and the crown about to remain in possession of the verdict,

Best, on the part of the defendant, applied for leave to tender a bill of exceptions to the ruling of the judge, to be deemed as if it had been tendered at the trial.

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The counsel for the crown offering no opposition,

THE COURT granted the application, expressing, however, some doubt as to whether a bill of exceptions lay on proceedings by information like the present.

POLLOCK, C. B., intimated his readiness to seal the bill of exceptions; and

ALDERSON, B., suggested, that in order to save the delay and expenses of a bill of exceptions, the question might be reargued before the barons, assisted by the judges of the other superior courts.

THE IMPERIAL GAS-LIGHT AND COKE COMPANY v. THE LONDON
GAS-LIGHT COMPANY.

May 31, 1854.

Statute of Limitations — Fraud.

To a plea of the statute of limitations, that the cause of action did not accrue within six years before the suit, it is no answer that, in consequence of the fraud of the defendant, the plaintiff was prevented from discovering the cause of action before that time, and that he commenced his action within six years after he discovered it.

THE first count of the declaration alleged that the defendants broke, bored, and cut into certain gas main pipes and other pipes of the plaintiffs, and affixed and fastened gas-pipes of the defendants and other pipes thereto, and kept and continued the said gas-pipes of the defendants, and the said other pipes so affixed and fastened thereto, for a long time then next following, by means whereof divers large quantities of gas, of and belonging to the plaintiffs, were allowed to escape and flow, and did escape and flow, from and out of the said gas main pipes and other pipes of the plaintiffs, and were wholly lost to the plaintiffs. The second count raised some questions unnecessary to notice at present, and there were also counts for the conversion of gas, for gas supplied to the defendants, and for money received by them to the use of the plaintiffs. The defendants pleaded to the first count and to the common counts, that the alleged causes of action did not, nor did any or either of them, accrue within six years before the suit. Replications: First, to the plea, so far as it related to the first and third counts respectively, the plaintiffs replied, that the causes of action in those counts mentioned, respectively, accrued and arose by and through the secret, covinous, and fraudulent acts of the defendants, in secretly, covinously, and fraudulently breaking,

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boring, and cutting into certain gas main pipes and other pipes of the plaintiffs, and secretly, covinously, and fraudulently affixing and fastening, and keeping and continuing affixed and fastened, gas-pipes of the defendants and other pipes thereto, as in the first count alleged; and in secretly, covinously, and fraudulently converting to the defendants' own use gas of the plaintiffs, as in the third count mentioned, by and through such gas-pipes of the defendants and such other pipes by them affixed and fastened to the said gas main pipes and other pipes of the plaintiffs; and that the defendants, for a long space of time after the committing of the said secret, covinous, and fraudulent acts, and continually until a time within six years next before the commencement of this suit, actively endeavored, covinously and fraudulently, to hide and conceal, and did thereby covinously and fraudulently hide and conceal, from the plaintiffs, the said several secret, covinous, and fraudulent acts, and each of them; and the plaintiffs, during all that time, and continually until a time within six years next before the commencement of this suit, by and through the covin and fraud of, and practised by, the defendants, were prevented from discovering or knowing, and did not discover or know, of the existence of the said causes of action in the said first and third counts mentioned respectively, or any of them; and the plaintiffs first discovered and knew of the last-mentioned several causes of action, and each of them, within six years next before the commencement of this suit. Secondly, to the plea, so far as it related to the third and fourth counts, that those causes of action accrued and arose by and through the secret, covinous, and fraudulent acts of the defendants in this, to wit; that the defendants secretly, covinously, and fraudulently broke, bored, and cut into certain gas main pipes and other pipes of the plaintiffs, and secretly, covinously, and fraudulently affixed and fastened, and kept and continued affixed and fastened, gas-pipes of the defendants and other pipes thereto, as in the first count alleged; and that by and through the said gas-pipes of the defendants, and the said other pipes so by them affixed and fastened as aforesaid, the defendants secretly, covinously, and fraudulently converted to the defendants' own use gas of the plaintiffs, and the defendants by and through the same secretly, covinously, and fraudulently took and used gas of the plaintiffs, and supplied and caused the plaintiffs, unknowingly to the plaintiffs, to supply gas of the plaintiffs to and for the defendants and divers other persons, as in the fourth count alleged; and secretly, covinously, and fraudulently, and unknowingly to the plaintiffs, took and received from divers persons to whom the gas of the plaintiffs was so supplied as aforesaid, the price and value of such last-mentioned gas, as in the said fifth count alleged; and the money payable in the fourth and fifth counts mentioned, was money claimed by the plaintiffs for the gas so supplied and caused to be supplied, and for the price and value thereof so taken and received by the defendants as last aforesaid; and that the defendants, after the committing of the said secret, covinous, and fraudulent acts hereinbefore mentioned respectively, and continually until a time within six years next before the commencement of this

suit, actively endeavored, covinously and fraudulently, to hide and conceal, and did thereby covinously and fraudulently hide and conceal, from the plaintiffs the said several secret, covinous, and fraudulent acts hereinbefore mentioned respectively, and each of them; and the plaintiffs during all that time, and continually until a time within six years next before the commencement of this suit, by and through the covin and fraud practised by the defendants, were prevented from discovering or knowing, and did not discover or know, of the existence of the said causes of action in the said fourth and fifth counts respectively, or any of them; and the plaintiffs first discovered and knew of the last-mentioned several causes of action, and each of them, within six years next before the commencement of this suit. To both these replications the defendants demurred, and the plaintiffs joined in demurrer.

Bovill, for the defendants. The question raised in this case is, whether in a court of law a plaintiff can relieve himself from the operation of the statute of limitations by saying, that, owing to the fraud and covin of the defendant, he was not acquainted with the cause of action until the period, limited by the statute, for bringing an action had expired. The point has never been decided in a court of law, but authority respecting it is to be found in courts of equity. In *Blair v. Bromley*, 5 Hare, 542, Sir J. Wigram, V. C., says: "In order that my decision in this case might be placed on as broad a basis as possible, I have endeavored to inform myself how the case would stand at law, if the plaintiffs had brought the action at law against the defendant, founded only on the receipt of the money. It is admitted that the statute of limitations would have been an answer to the demand. I have endeavored to inform myself whether there was any form of action by which the plaintiffs' proceedings at law might have avoided the statute of limitations; and I believe I am correct when I say, there is no proceeding at law by which they could have avoided the effect of the statute;—no proceeding founded solely on any distinction arising out of the fraud. The consequence is, that the plaintiffs have lost their remedy at law; and they are remediless unless relief be given in this court. The jurisdiction of this court is assumed on the ground of the fraud, and the time will run only from the discovery of the fraud." Many cases have established the principle that the statute of limitations runs from the accruing and not from the discovery of the cause of action.

[PLATT, B. Yes. There is *Short v. M'Carthy*, 3 B. & Al. 626.

MARTIN, B. Several cases have occurred of attorneys misappropriating money intrusted to them for investment, but the fraud not having been discovered until the statute of limitations has run out, the party has been held without remedy.

ALDERSON, B. It constantly occurs in coal-mines that one man takes the coals of another, and by fraud prevents its being found out for more than six years, yet that is no answer to the statute of limitations, and is a hardship which can only be remedied by the legislature.]

[He was then stopped.]

Wilde, for the plaintiffs. The point on which this case depends has never been judicially determined, and must, therefore, be decided according to the established principles of law. The courts should deal with the statute of limitations as they have done with many statutes, that is, construe it by equity to reach cases clearly within its scope and intention, though not precisely within its language. Now, it is a well-known rule of law that no man shall be allowed to take advantage of his own wrong, and, consequently, where a man, through his premeditated fraud, prevents another bringing his action within the time prescribed by the statute of limitations, he ought not afterwards to be allowed to set up that statute as a defence. It is the same as if a plaintiff, going to take out his writ on the last day of the six years, were forcibly seized by the defendant, and locked up until the next morning.

POLLOCK, C. B. On these replications our judgment must be for the defendants. The statute of limitations expressly points out certain cases in which it is not to run, that is, the cases of persons under certain species of incapacity, but it does not make any exception in favor of persons laboring under any other incapacity, and we cannot graft upon the statute the exception here sought to be grafted on it, namely, where by the fraud of the defendant the plaintiff has been prevented from asserting his rights within the time prescribed by the statute. The truth is, that there are certain classes of actions in which there is great difficulty in ascertaining the facts. To take one instance. Lord Tenterden, who brought in the 9 Geo. 4, c. 14, in a conversation with me, stated that the reason of his inserting the 6th section was, that he observed for years that there were always in his paper for trial two or three actions brought for giving fraudulent characters, and observing, further, that those actions always succeeded, he suspected something wrong, for the defendant, in such cases, must sometimes have a good defence. He, therefore, brought in a bill which passed into what I think one of the most salutary statutes in our law, which enacts, among other things, that no action shall be brought to charge any person on any representation of character, however fraudulent, and however expressly given with intent to produce mischief, unless the representation be in writing. And, I believe, if we were to hold the legislature as having enacted that the statute of limitations should not run whenever the jury are satisfied that a fraud has been practised to prevent its operation, it would not only give rise to much litigation, but to that which the law abhors, continual litigation: "*Interest reipublicæ ut sit finis litium.*" The statute of limitations has been called a statute of peace, but if the construction here contended for by the plaintiffs were to prevail, whenever there was a case of hardship or suggestion of fraud, you would have an action brought, though the statute had expired, and have it urged that the matter was for the jury, and not for the court.

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ALDERSON, B. There would be no statute of limitations against a widow with six children.

PLATT, B., and MARTIN, B., concurred.

Judgment for the defendants.¹

Ex parte SUMMERS, in re M'KILLAR v. SUMMERS.

May 27, 1854.

County Court — Certiorari — Prohibition — Interpleader.

No *certiorari* lies, to remove into a superior court interpleader proceedings in a county court.

The officer of a county court who has seized goods in execution, under process of that court, is not required to retire from possession of them because an interpleader summons has been issued.

It is no ground for a prohibition to a county court, that, under process from that court to levy a sum within its jurisdiction, the officer has seized property to a greater amount.

A PLAINT between M'Killar, plaintiff, and Summers the younger, defendant, was, on the 3d May, heard by the judge of the County

¹ In many American States, it is now expressly enacted that a fraudulent concealment by a defendant, of any cause of action, from the knowledge of the person entitled thereto extends the time in which the action may be brought, to six years from the time such fraud shall be discovered by the party interested. Such is the law in Massachusetts. Mass. Rev. Sts. c. 120, s. 12. Maine Rev. Sts. c. 146, s. 18.

But it has been held in many States, that such would be the effect of fraud, even without any statutory provision on the subject. *First Mass. Turnpike Company v. Field*, 3 Mass. 201; *Homer v. Fish*, 1 Pick. 435; *Welles v. Fish*, 3 Pick. 74; *Sherwood v. Sutton*, 5 Mason, 143; *Jones v. Conoway*, 4 Yeates, 109; *Harrel v. Kelly*, 2 McCord, 426; *Pennock v. Freeman*, 1 Watts, 401; *Croft v. Arthur*, 3 Desaussure, 223.

On the other hand, numerous, respectable, and well-considered authorities have adopted a contrary doctrine, and concur with the case in the text, that *at law*, independent of any express provision, the statute of limitations begins to run from the time the cause of action first accrued, notwithstanding the defendant has fraud-

ulently concealed it from the plaintiff. *Smith v. Bishop*, 9 Vermont, 110; *Troup v. Smith*, 20 Johnson, 23; *Oothout v. Thompson*, Id. 277; *Callis v. Waddy*, 2 Mumford, 511; *Hamilton v. Shepherd*, 2 Murphy, 125; *Leonard v. Pitney*, 5 Wend. 30; *Miles v. Berry*, 1 Hill, (S. C.) 296; *Cocke v. McGinnis*, Mart. & Yerg. 361; *Fee v. Fee*, 10 Ohio, 469; *Allen v. Mille*, 17 Wend. 202.

And in those States where such fraud is held to avoid the statute bar, a very clear case of fraud and concealment is held essential; for if the party defrauded either discovered his rights, or had the means of discovering them, but neglected so to do, he cannot avail himself of the defendant's fraudulent design or attempt to keep him in ignorance. See *Farnam v. Brooks*, 9 Pick. 213; *McKown v. Whitmore*, 31 Maine, 448; *Cole v. McGlathry*, 9 Greenl. (Bennett's ed.) 131, and note.

A fortiori, the concealment, by an insolvent debtor who has been discharged, of acts which would render his discharge void, is not such a concealment of the cause of action, as will extend the statute. *Rice v. Burt*, 4 Cush. 208.

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Court of Kent, holden at Rochester, and an order made on the defendant to pay 23*l.* 5*s.* 3*d.* debt, together with 5*l.* 1*s.* 8*d.* costs. Under this order execution was issued, and a brick field supposed to belong to the defendant entered, and certain goods and chattels therein, likewise supposed to belong to him, seized and taken possession of by the bailiff of the court. James Summers, the elder, having laid claim to them, the following interpleader summons was served on the 6th instant:—

“Between Peter M'Killar, plaintiff, and James Summers the younger, defendant.

“James Summers the elder, of &c.,

“You are hereby summoned and required to appear at a court to be holden at Rochester, on the 7th June, 1854, at the hour of ten in the forenoon, touching a claim made by you to certain goods and chattels seized and taken in execution under process issued out of this court, in this action, and in default of your then establishing such claim, the said goods and chattels will be sold according to the exigency of the said process; and take notice that you are hereby required five days before the said 7th June, 1854, to deliver to the officer in charge of the said process, and to leave at my office, at Rochester, a particular of the goods and chattels so claimed by you, and of the grounds of your claim, and in such particular you are fully to set forth your name, description, and address.

“Given under the seal of the court, this 6th May, 1854.

“GEORGE ACKWORTH, *Clerk of the Court.*

“To Mr. James Summers the elder, &c.”

Worsley, on the part of the claimant, moved either for a *certiorari*, to remove the interpleader into this court, or for a prohibition to the county court to proceed further in the matter. This application was founded on an affidavit of the claimant, stating the above facts, and that the goods and chattels seized were of the value of 400*l.* at least. The right to remove proceedings from an inferior court by *certiorari*, is a common law right, which can only be taken away by express enactment. Now no statute takes away that right in the case of interpleader proceedings in county courts, and there being no appeal in such cases is an additional reason why a *certiorari* should lie.

[POLLOCK, C. B. A *certiorari* only lies to remove a record; here there is no record to remove. It lies to remove a cause from the county court, but this interpleader is a mere excrescence on a cause there.

ALDERSON, B. The cause in the county court has been heard and determined, and this interpleader is merely an interlocutory proceeding to satisfy the conscience of the county court judge as to whether certain goods seized under its process are the property of A or of B. Being thus an ancillary proceeding to obtain information for a court, it must begin and end in the court that requires the information. A *certiorari* no more lies to remove such a proceeding as this than it would to remove proceedings in the county court for contempt of that court, or the summons of a judge at chambers.

M'Killar v. Summers.

MARTIN, B. In *Durant v. Tomlin*, 11 Law T. 267, it was held, that as the superior courts of common law have no jurisdiction to try, or machinery to deal with, questions involving partnership accounts, such a cause of action, if brought in a county court under the 9 & 10 Vict. c. 95, s. 65, cannot be removed into them.]

Then there are two grounds on which the court ought to issue a prohibition. First, the effect of the interpleader summons being to suspend the execution, the county court ought to have directed its bailiff to retire from possession of the property until the summons was heard and determined. In *Re Hardy v. Walker, ex parte M'Fee*, 23 Law J. Rep. (N. S.) Q. B. 57, s. c. 24 Eng. Rep. 448, it was held that where a county court judge decides that the particulars of a claim in an interpleader summons are not sufficient according to the rules made under the County Courts Act, and refuses on that account to hear the claimant, a prohibition lies to stay the further proceedings under the execution, if the particulars ought to have been held sufficient. PLATT, B., there says: "The interpleader summons ought to be properly disposed of before the county court judge proceeds any further;" and PARKE, B., says: "The jurisdiction of the county court to go on with the plaint is taken away as soon as the claim is properly put forward."

[PLATT, B. No. It was the duty of the bailiff to keep possession of the goods until the interpleader was decided. Most probably were he to retire from possession, the party not entitled to the goods would carry them off. You might as well contend that a sheriff executing the process of a superior court should retire whenever an interpleader takes place.]

Secondly, in this case it appears that goods were taken in execution to the value of 400*l.*, a sum exceeding 50*l.* the limit of the jurisdiction of the county court.

[POLLOCK, C. B. Where a suit is regularly brought in the county court, and its officer deals with property to any amount, all questions respecting that must be determined in that court, and we cannot interfere.]

ALDERSON, B. The county courts would do well to follow the practice of the superior courts in matters of this kind, that is, require the amount levied, or so much of it as may suffice for the purpose, to be brought into court to satisfy the execution; and if the amount levied is insufficient for that purpose, then direct the party to pay in or find security for so much more as may be requisite.]

Rule refused.

Theobald v. Railway Passengers Assurance Co

THEOBALD v. THE RAILWAY PASSENGERS ASSURANCE COMPANY.

June 13, 1854.

Railway Accident — Damages — Insurance.

A company called "The Railway Passengers Assurance Company," incorporated by statute, entered into a contract of insurance with a party, whereby they undertook to pay 1000*l.*, to his legal representatives in the event of death happening to the assured from railway accident whilst travelling in any class carriage, on any line of railway in Great Britain or Ireland, a proportionate part of that sum to be paid to the assured himself in the event of his sustaining any personal injury by reason of such accident. The assured travelled in a railway carriage to a certain place, and in getting out of the carriage after the train stopped met with an injury, without any negligence on his part, and in consequence of the step of the carriage being accidentally slippery: —

Held, first, that this was a railway accident within the meaning of the policy.

Secondly, that the assured could only recover for the personal expense and pain occasioned to him by the injury, and was not entitled to damages for loss of time or loss of profit occasioned by it.

Thirdly, that it was not a true measure of damage to assume 1,000*l.*, the sum insured, as the value of life, and estimate a proportionate sum for the injury sustained.

Per POLLOCK, C. B., where a party is unintentionally injured by the act of another, it is unmanly, though undoubtedly legal, to claim damages for pain and suffering.

THE declaration stated, that, in consideration of 1*l.* paid by the plaintiff to the defendants, the defendants made and entered into a certain ticket and contract of assurance in writing with the plaintiff, in the words and figures following, that is to say: —

" Railway Passengers Assurance Company.

" Empowered by special act of parliament, 12 & 13 Vict. c. 40. Capital, One Million. Offices, No. 3, Old Broad-street, London. Insurance ticket, £1,000, No. a 4113. Premium £1.

" Mr. Robert Theobald, of 11, Grove-terrace, Kentish-town, is hereby assured by the Railway Passengers Assurance Company in the sum of 1,000*l.*, to be payable to his legal representatives, according to the conditions hereupon indorsed, in the event of death happening to the said assured from railway accident whilst travelling in any class carriage on any line of railway in Great Britain or Ireland, or a proportionate part of the said 1,000*l.* will be paid to the assured himself in the event of his sustaining any personal injury by reason of such accident, such insurance to be in full force and effect from the date hereof until the 17th day of May, 1854. Dated Tuesday, the 17th day of May, in the year of our Lord 1853.

" Received 1*l.*

ALFRED ROOFE, *Cashier.*

" WILLIAM JOHN VIAN, *Secretary.*"

" Railway Passengers Assurance Company — Conditions of Assurance.

" 1. The assured in case of personal injury, or his legal representa-

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tives in the event of his death, must give notice thereof in writing to the company, at their offices in London, within a reasonable time after the said injury or death, otherwise the assurance hereby effected will be null and void.

“ 2. Such notice must set forth the christian and surname, occupation, and address of the assured, and of the person giving the notice.

“ 3. In the event of any dispute arising as to the sum to be paid to the assured by way of compensation for personal injury, the same shall be settled by arbitration, in conformity with the provisions of the company's special act of parliament.

“ 4. As the company limits the risk on any one life to the sum of 1,000*l.*, no second ticket of this company for the assurance of such life will be available during the period for which this ticket is issued.”

It then alleged that the plaintiff, after the 17th May, 1853, and before the 17th May, 1854, was lawfully travelling in a certain railway carriage, on a line of railway in Great Britain, and whilst so travelling sustained a personal injury, by reason of a railway accident, within the true intent and meaning of the said ticket and contract of assurance, and which was not caused by his own negligence or wilful act, whereby he became lame and disabled from attending to his business, and so continued for a long time, and suffered great pain, and was compelled to remain at several places at great expense in his said journey before arriving at his home, and to procure medical attendance, and incurred a great loss of time and business both at home and abroad, whereby he sustained and was put to great loss and expense. The declaration then proceeded to aver performance by the plaintiff, notice in writing to the defendants of the accident, that the defendants repudiated their liability to make any compensation, and that no dispute ever arose between them and the plaintiff as to the amount of compensation, &c. Pleas— first, that the defendants did not make or enter into the said ticket or contract of assurance, &c.; and secondly, that the injury to the plaintiff was caused by the negligence of the plaintiff, and not by reason of any railway accident within the true intent and meaning of the said ticket or contract of assurance, &c. Issue on both pleas. At the trial, before Pollock, C. B., it appeared that the defendant company had been incorporated by statute, under the name and style of “The Railway Passengers Assurance Company,” and was formed “for the purpose of insuring compensation for loss of life or for personal injury to persons travelling by railway, whether arising from accident or negligence.” Certain powers had been conferred on it by the 12 & 13 Vict. c. 40, (local and personal;) but that statute, with the exception of certain provisions relating to stamp duties, immaterial to the present purpose, was repealed by the 15 Vict. c. 100, (local and personal,) intituled “An act to confer additional facilities for the insurance of railway passengers and other persons by the Railway Passengers Assurance Company.” The parts of this statute

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bearing on the questions raised in the case are as follow : Section 3. " It shall be lawful for the Railway Passengers Assurance Company to insure compensation for loss of life or personal injury to persons travelling by railway, whether arising from accident or negligence ; and, in addition to such power, it shall be lawful for the company to insure compensation to any person, or his legal personal representatives, for or on account of any injury caused by any accident whatever other than accidents occurring to persons travelling by railway." Section 4. " Every contract, ticket, or other instrument whereby the company shall become bound to pay any sum of money by way of compensation to any person, or his legal representatives, for or on account of any injury caused by accident generally, whether resulting in death or otherwise, which may be sustained by such person, shall be deemed and taken to be a contract of insurance within the meaning and for the purposes of this act ; and any such contract may be in such form and may be issued in such manner as the company may determine, and may contain such conditions, not inconsistent with the provisions of this act, as may be specified therein ; provided, nevertheless, that in all cases contracts or tickets of insurance for particular journeys by railway issued under the authority of this act shall be held to be a valid execution on the part of the company of the contract set out in the schedule to this act, and that no other matter or thing shall be required to be done by the company in order to legally bind the company to the due performance thereof." Section 8. " As regards holders of insurance tickets for particular journeys by railway, in the event of personal injury or death, whether arising from accident or negligence, happening to the *bonâ fide* holder of any insurance ticket issued by the company during the journey in respect of which such ticket shall have been issued, such *bonâ fide* holder, or his legal representative, or in case such *bonâ fide* holder shall be a married woman, then her husband, may recover on the said contract or policy set out in the said schedule in an action at law, as fully and effectually as if the company had duly and effectually and regularly executed the said contract or policy, and delivered the same, so executed, to such *bonâ fide* holder on the marking and issuing of the said insurance ticket, and the company shall be taken to have fully and effectually contracted with and agreed to insure such *bonâ fide* holder, according to the terms and the true intent and meaning of the said contract or policy by the marking and issuing of the said ticket, and no further or other act on the part of the company shall be necessary to legally bind them to perform the same : provided always, that no action shall be brought thereon against the company until after the expiration of one month after notice thereof." Sections 12, 13, and 14, requires notice of the death or injury to be given to the company within fourteen days, and empower the company to examine the body or person, &c. Section 15. " In all cases other than those of death, within thirty days after the company shall have received such notice as aforesaid, the company shall offer such amount of compensation as to the company shall seem just and reasonable, in propor-

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tion to the extent of the injury, and to the sum payable in case of death; regard being had to the particular premium of insurance which shall have been paid by such holder or party, by leaving a notice thereof at the address given by him as aforesaid." Having provided that in all cases where compensation is offered by the company, and the amount of it disputed by the claimant, the question shall be determined by arbitration, the statute proceeds in its 35th section to enact, that no contract of the company, or any compensation received or recoverable by virtue of such contract, either under the act or otherwise, shall be held to prejudice or affect any right of action, claim, or demand, which any person, or his executors or administrators, may have against any other company, or any person, either at common law or by virtue of the 9 & 10 Vict. c. 93, or any other act of parliament, for the injury, whether fatal or otherwise, in respect of which such compensation shall have been received or be recoverable. The schedule referred to in the act is as follows:—

"The Railway Passengers Assurance Company.

"Empowered by an act, &c., and by a certain other act, &c.

"Know all men by these presents, that if any person above the age of twelve years about to travel by railway shall, on payment of the premium of insurance, demanded by the said company in respect thereof, duly obtain any insurance ticket marked with the marks of the said company, the said company hereby agrees, in consideration of the payment of such premium as aforesaid, with such person as follows; (that is to say;) if such person shall, during the particular journey for which such insurance ticket shall have been issued, while travelling by railway sustain any personal injury whatever, caused by railway accident, then the said company shall pay to such person, on proof of such injury, such sum, not exceeding the amount declared to be insured by such insurance ticket, as shall, with reference to and in proportion to the whole sum insured and made payable as hereinafter mentioned in case of death, be deemed a reasonable compensation for such injury sustained by such person, such compensation to be ascertained and paid in the manner provided by this act; and if such person shall die from the effect of such injury within three months after the occurring of the same, then the company shall pay to the executors or administrators of such person, on proof of such death, the whole sum expressed in such insurance ticket; provided always, that in case the said company shall, before the death of such person so injured as aforesaid, have paid any sum of money to such person, &c., as and by way of compensation for such injury, such sum of money so paid as aforesaid, may, on the death of such person, &c., after such payment or payments, and within three months after the occurring of the said injury, be deducted by the said company from the sum of money hereby otherwise agreed to be paid by them in the event of such death as aforesaid; and provided always, that the said company shall in no case be liable to pay to the holder of any insurance ticket, or to his executors or administrators, any sum of money

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in respect of any injury caused by the negligence or wilful act of such holder. In witness, &c."

The plaintiff, who had effected with this company the insurance set out in the declaration, was proceeding on a journey of business from Birmingham to Shrewsbury, and according to the regulations of the companies managing the line, received a ticket for the intermediate station of Wolverhampton, where a change of carriages takes place. On the arrival of the train of Wolverhampton, the passengers, including the plaintiff, proceeded to get out of the carriage for that purpose; but the step being slippery, in consequence, as was supposed, of some rain having fallen during the journey, his foot slipped and became entangled between the carriage and platform, thereby receiving considerable injury. The plaintiff did not prefer any demand for mere pain and suffering caused by the accident, but claimed in respect of it, 34*l.* 19*s.*, for medical and other expenses, 100*l.* for loss of time, and 100*l.* for loss of profit. It being suggested that this was not a railway accident within the meaning of the policy, the judge reserved leave to the defendants to move to enter a verdict on the second plea; and, if necessary to raising that question, to amend that plea by striking out the averment of negligence on the part of the plaintiff. The defendants' counsel then contended, that supposing the accident to be a railway accident, the plaintiff was not entitled to recover compensation in damages for every consequential injury, however remote, that might have resulted from it. He further argued that the true measure of damage was a proportionate share of the 1,000*l.* which the company contracted to pay in the event of the death of the assured — that for the purpose of such an insurance, the life of the party was valued at 1,000*l.*, and any less injury was to be treated as an average loss; or, as he expressed it, as 1,000*l.* : death : : *x* (an unknown sum to be determined by the jury) : the corporal injury sustained. The judge, reserving leave to the defendants' counsel to move to reduce the amount of the verdict on these points, left the question of damage to the jury, telling them he did not think the plaintiff could recover both for loss of time and loss of profit. The jury thought that there had been no negligence in the plaintiff with reference to the accident, and found a verdict for him, apportioning 34*l.* 19*s.*, for medical attendance and expenses, and 100*l.* for the loss of time or of profit. A verdict was accordingly entered for the plaintiff for 134*l.* 19*s.*, it being agreed between the parties, that if the court in banc should think that the damages ought to be estimated by calculating an average loss, that should be done by the Lord Chief Baron in order to avoid further litigation.

Macaulay, in Easter term, obtained a rule on the points made at the trial; which was argued during the present term; before POLLOCK, C. B., ALDERSON, B., PLATT, B., and MARTIN, B.

Bramwall and *Phipson* showed cause. By the 3d section of their act, the company are empowered to insure against every species of

accident, as well as accidents occurring in respect of railways. The question, therefore, comes to the construction of the present contract of insurance into which they have entered; and as the words of parties are to be taken most strongly against themselves, if it should be a measuring cast, the plaintiff is entitled to succeed. It consequently may not be necessary to decide the abstract question, what is a railway accident? though it is important to consider it. On this subject, several cases were put when the rule was moved. The question was asked, "Would it be a railway accident, if a man during a journey by railway, were suddenly to get up and strike his head against the top of the carriage; or, imagining a window to be open when it was shut, were to dash his head through it; or to light a cigar, not knowing that his opposite neighbor had a bag of gunpowder in his lap?" So, if a man sitting in a carriage were shot by the pistol, or had his eye put out by the umbrella, of a fellow-passenger.

[ALDERSON, B. Or were to receive a contagious disease from him.

MARTIN, B. Suppose the plaintiff had slipped in consequence of a piece of orange-peel being on the steps of the carriage.

POLLOCK, C. B. Or suppose a passenger eating in the train, were to cut his hand with a knife, or be choked by a chicken bone.]

It must freely be admitted that none of those come within the notion of railway accidents; but, on the other hand, that expression must not be limited to the terrific injuries occasionally caused by trains running off a line, or into each other. The court must put a common-sense construction on the term "railway accident;" and it seems to mean any accident having its essence in the peculiarities or properties of railway travelling, one of which is, that when a passenger leaves a railway carriage, he steps on the platform. The 35th section shows this to have been the meaning of the legislature in this enactment; at least, the 4th section and the schedule have no bearing on the present case, as only applying to insurances for particular journeys. With respect to damages, it is difficult to estimate the value of a man's life.

[ALDERSON, B. Yes. If a man's house or shop is burnt, you can indemnify him by giving him a new one, but how can you give him a new life? It therefore becomes indispensable to take some pecuniary rule.]

Compensation to the personal representative in case of the death of the deceased, and compensation for injury to the man himself while living, cannot be governed by the same principle. The 1,000*l.* marked on the ticket is only the maximum limit of compensation to be given in case of death, for as to the mathematical proportion suggested between —

[ALDERSON, B. It is absurd. You need not discuss that.]

Thesiger and *Davison*, contra. The question has been truly stated by the other side to be, what is the meaning of this particular contract; and that depends, in a great degree, on the meaning of the term "railway accident." Definitions are perilous, but "railway accidents" may reasonably be defined thus — such as arise through the medium

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of the means of conveyance used, whether in motion or not, occasioned by the negligence of the railway company or their servants, or the act of a stranger, or by unavoidable accident, or by collision with another train, and not from the act of the party himself, whether travelling in a railway carriage, or crossing a line, or on a platform.

[ALDERSON, B. Like persons codifying the laws, you seem to have left several things out. All you mention are railway accidents, but have you exhausted the subject?]

The accident must not be merely incidental to railway travelling, but peculiar to it. Accordingly, if a man in a railway train, rises up and strikes his head, or while waiting on the platform is run against by another who is in a hurry to reach the carriages, these are not railway accidents; but injuries connected with the getting into or out of the train, are railway accidents. The present contract, however, is limited to accidents "whilst travelling." As to the question of damages. The loss of time or loss of profit, is too remote to be consequential damage. The correct rule on this subject, is laid down by this court in its considered judgment in *Hadley v. Baxendale*, 9 Exch. 354, s. c. *ante*, 398: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract, should be such as may fairly and reasonably be considered either arising naturally, that is, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it." In the case of fire, insurance damages for loss of profits are never given. Besides, this contract is limited to "personal," that is, bodily injuries, which view is confirmed by those parts of the statute referring to medical inspection. The jury might, indeed, have taken into their consideration the pain and suffering caused by the injury, but no claim was made on account of it.

[POLLOCK, C. B. A jury most certainly have a right to give compensation for bodily suffering unintentionally inflicted, and I never fail to tell them so. But when I was at the bar, I never made a claim in respect of it, for I look on it not so much as a means of compensating the injured person as of damaging the opposite party. In my personal judgment, it is an unmanly thing to make such a claim. Such injuries are part of the ills of life, of which every man ought to take his share.

ALDERSON, B. It does not follow that a man's proceeding on his journey must be a source of profit to him. He might be stopped on a journey when going to make a bad bargain. In the reign of Queen Mary, as a person called the Apostle of the North was being taken to London, to be burnt as a heretic, he received an injury on the road which stopped his journey, and in the mean time Queen Elizabeth came to the throne. That man received an injury, but no damage.]

As this contract fixes the value of life at 1,000*l.*, a proportionate sum for the loss of business may be calculated on that basis.

[MARTIN, B. In the ancient laws and institutes of Wales, there

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is a value set on each of the members of the human body, and I observe, it is said: "The worth of the tongue is equal to the worth of all the other members, because it defends them.¹]

THE COURT intimated its intention to take time for consideration, suggesting, however, that the parties should come to terms.

Cur. adv. vult.

The judgment of the court was now delivered by

POLLOCK, C. B. In this case, a motion was made to reduce the verdict found for the plaintiff, and also to enter a verdict for the defendants on one of the pleas. The objection made to the verdict altogether on that plea was, that the accident in respect of which the action was brought was not a railway accident, within the meaning of the policy of insurance entered into by the defendants. The objection to the amount of the verdict was, that the defendants were not liable for the loss of time or loss of profit incurred by the plaintiff, but only for the personal injury occasioned by the accident, assuming it to be a railway accident. The case was argued, and the court took time to consider its judgment, in the hope that in the mean time the parties might come to some arrangement. But it has been intimated to us that there is a desire on the part of the company to obtain the judgment of the court on the points raised, and consequently they are unwilling to enter into any arrangement; and I believe also the having those points settled would be advantageous for railway passengers.

As our decision in this instance is to lay down a rule for the future, it would be more satisfactory if all the elements to come to a general one were before the court. The facts of the case were, however, these: The plaintiff, who was about to take a journey by means of two distinct railways, had insured himself with the defendants against death or personal injury arising from railway accident whilst travelling, the contract fixing the damage on the former event at 1,000*l*. In getting out from one of the carriages, on a rainy morning, his foot slipped, but the jury found that there was no negligence on his part in reference to the accident. And the first question is, whether this is a railway accident within the meaning of the policy. We are of opinion that it is. However much the company may desire that we should lay down a general rule as to what is a railway accident, I do not know that we are called on, or should be doing our duty, were we to lay down any rule beyond what is necessary to decide the actual case before us. Considering the great number of particulars that may enter into the decision of questions of this nature, and the very complicated character they may assume under circumstances

¹ See the Venedotian Code, book 3, c. 23; the Dimetian Code, book 2, c. 17; and the Gwentian Code, book 2, c. 6.

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that at present we may not anticipate, I think, and I believe the rest of the court concur with me in thinking, that in a single instance brought before us under certain circumstances, some of them not of a general nature, it would be assuming too much to lay down a rule to govern all cases. On the present occasion, it is quite plain that the plaintiff was a traveller on the railway; it is quite plain that though at the time of the accident his journey had in one sense terminated by the carriage having stopped, he had not ceased to be connected with the carriage, for he was still on it. The accident also happened without negligence on his part, and while doing an act which, as a passenger, he must necessarily have done, for a passenger must get into the carriage, and get out of it when the journey is at an end, and cannot be considered as disconnected with the machinery of motion until the time he has, as it were, safely landed from the carriage and got upon the platform. The accident is attributable to his being a passenger on the railway, and it arises out of an act immediately connected with his being such passenger. Under these circumstances we think this was a railway accident within the meaning of the policy; and consequently the action is, in our judgment, maintainable, and so much of this rule as prays for a verdict for the defendants on this second plea must be discharged.

In order that the various questions raised at the trial respecting damages might be considered by the court in banc, the verdict of the jury was taken *simpliciter*. They found for damages and expenses 34*l.* 19*s.*, for loss of time, 100*l.*, for loss of profit also, 100*l.*, for all of which the plaintiff made his claim at the trial. I thought it quite clear that he could not claim both loss of time and loss of profit, which are the same things under two different forms — if indemnified for time he had no right to claim for profit, and if indemnified for profit he had no right to claim for time. I also had considerable doubt whether he was entitled to charge either, and I therefore directed the jury to find for one only, with leave to move to strike out both if the court should think right. On considering the arguments used on both sides, we think that the verdict should be reduced to 34*l.* 19*s.* We are of opinion that the object of the insurance must be treated in the same way, whether considered with reference to the death of the party or to something that inflicts injury short of it; and we think that, in considering the damage and injury done to the traveller, the consequential mischief of losing some profit is to be taken into consideration; otherwise, a passenger whose time or business is more valuable than that of another would, for precisely the same personal injury, receive a greater remuneration than that other. What the insurance company calculate on indemnifying the party against is the expense and pain and loss connected with the immediate accident, and not remote consequences that may follow according to the business or profession of the passenger. The verdict must, therefore, be reduced to 34*l.* 19*s.*, and so far the rule must be made absolute.

ALDERSON, B. It was contended that the estimate of damage depended on some proportion to be ascertained between the amount of

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injury caused by the accident, and the amount of loss in the event of the death of the party, in which latter event the damage is limited to 1,000*l.*, the sum insured. I, at least, think no such proportion exists. The true measure of damage is the personal injury resulting from the accident, not exceeding, however, the sum which the company would have to pay in the case of death. As to railway accidents, my notion of a railway accident is an accident occurring in the course of travelling, and arising out of the fact of the journey. It does not necessarily depend on any accident to the railway or machinery connected with it.

*Rule to enter a verdict on the second plea discharged. Rule to reduce the verdict to 34*l.* 19*s.* absolute.*

POTTER v. THE COMMISSIONERS OF INLAND REVENUE.

June 15, 1854.

Stamp Duty — Good-will of Trade — Transfer.

The transfer of the good-will of a trade is an assignment of property, within the Stamp Act, 55 Geo. 3, c. 184, and requires an *ad valorem* stamp, accordingly.

THIS was a special case stated for the opinion of the court under the 13 & 14 Vict. c. 97, s. 15, and argued in Easter term, on the 8th May, in order to ascertain the amount of stamp duty payable on a certain instrument executed in 1853 — the sole question being whether an assignment of the good-will of a trade is liable to the *ad valorem* duty imposed by the 55 Geo. 3, c. 184.

Cur. adv. vult.

The judgment of the court was now delivered by

POLLOCK, C. B. We are of opinion that the assignment of the share of the good-will of the trade, in this case, is an assignment of property, within the meaning of the Stamp Act, and liable to *ad valorem* duty.

The 55 Geo. 3, c. 184, schedule, part 1, tit. "Conveyance," imposes the *ad valorem* duty, "upon the sale of any lands, tenements, rents, annuities, or other property, real or personal, heritable or movable, or of any right, title, interest, or claim in, to, out of, or upon any lands, tenements, rents, annuities, or other property, that is to say, for and in respect of the principal or only deed, instrument, or writing, whereby the lands, or other things sold, shall be granted, leased, assigned, transferred, released, renounced, or otherwise conveyed to, or vested

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in, the purchaser or purchasers, or any other person or persons, by his, her, or their direction."

If we were for the first time to construe this clause, we do not feel any doubt that it was meant to apply to every sale, for a sum of money, of any subject of property — of that which belonged to a person exclusive of others, and which could be the subject of bargain and sale to another. The trade or good-will of a trade sometimes enhances the value of real property, as a well-accustomed tavern or shop will, on account of the habit of persons to frequent it, sell for much more; and the duty on a conveyance of the place where the business is carried on, ought *pro tanto* to be augmented; and very frequently the good-will of a business or profession, without any interest in land connected with it, is made the subject of sale, though there is nothing tangible in it; it is merely the advantage of the recommendation of the vendor to his connections, and his agreeing to abstain from all competition with the vendee; still, it is a valuable thing belonging to himself, and which he may sell to another for a pecuniary consideration.

And we think no judicial construction has been put on the act by decided cases by which we are bound.

In the case of *Warren v. Howe*, 2 B. & Cr. 281, the court decided that an assignment of a judgment debt did not require an *ad valorem* stamp on a mortgage of property, because it did not fall within the definition of a mortgage in the Stamp Act, and that it was not within the clause as to conveyance, for that only applied to such descriptions of property as are usually the subject of sale; now, the good-will of a trade does not fall within that description. Afterwards, in *Blandy v. Herbert*, 9 B. & Cr. 396, where there was an assignment of a policy of assurance on which no loss had occurred, Lord Tenterden held, that it could not be considered as "property," within the meaning of the first clause as to conveyance. In the case, however, of *Coldwell v. Dawson*, 5 Exch. 1, this court held, that the assignment of a policy of assurance as a security for a debt was property within the clause in the schedule as to "mortgage;" and on contrasting the two clauses, though one differs a little from the other, every description of property is meant to be included in both. Since that case, we do not doubt that the assignment of a judgment debt or policy of assurance is within both one clause and the other.

The case of *Belcher v. Sikes*, 6 B. & Cr. 234, where two persons agreed to dissolve partnership, and one to assign all his interest in certain contracts, and all debts due to the concern or partnership, and that the share of one should be deemed to be 50,000*l.*, 30,000*l.* of which had been paid; and the action was brought on a covenant to pay the remainder; the court held, entirely on the authority of *Warren v. Howe*, that this was not property within the meaning of the Stamp Act; but, as the case was to go to a new trial, Lord Tenterden said the point might be more solemnly raised. As the case of *Warren v. Howe* has been, in effect, overruled, this case cannot be considered as an authority.

The case of *Lyburn v. Warrington*, 1 Stark. 162, is the only other

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authority to be considered. There, there was an agreement, by deed, that the plaintiff should relinquish his trade of a butcher in favor of the defendant, who was to be admitted into the house then occupied by the plaintiff, the business to be carried on in the plaintiff and defendant's names for ten years, the defendant to have possession of all the house but one room, and also the fixtures. There was a covenant to pay 1,000*l.* down, and 1,000*l.* by ten quarterly payments. The objection was taken that an *ad valorem* stamp was required under the 48 Geo. 3, c. 149, (which is in similar words,) because, "since the possession of the house was to be given for ten years, and the fixtures were included, the transaction was to be considered as a sale of these interests." Lord Ellenborough at Nisi Prius held, that as the house and fixtures were to be auxiliary to the carrying on the business, and as there was no mention of any distinct substantive property exclusive of the trade, the case did not fall within that clause of the Stamp Act. It is clear that this case was never presented to his lordship's mind as the purchase and sale of "good-will," and we cannot, therefore, consider it as an authority of any value on this question.

We think that "good-will" falls under the description of "property." Were it otherwise, in cases where the good-will operated as an increase of the value of real property, as in the sale of a well-accustomed shop, the revenue could be easily defrauded by dividing the price of the real estate and the good-will into two portions, and paying the duty only on the former part.

Judgment for the crown.

IN THE EXCHEQUER CHAMBER.

THE GREAT NORTHERN RAILWAY COMPANY v. HARRISON.¹

June 27, and July 3, 1854.

Railway — Free Pass — "Not transferable" — Evidence for Jury.

In an action against a railway company for injury to the plaintiff by negligence, the defendants pleaded that the plaintiff was not lawfully in their carriage. The evidence tended to show that the reporters for "Bell's Life in London," of whom the plaintiff was one, when going to races in that capacity, were accustomed to travel free. The plaintiff, acting *bond fide* as such reporter, was supplied with a ticket, which bore the name of a person connected with the paper, but not the plaintiff's, and on it were the words "not transferable," and a memorandum that any other person using it than the person named in it would be

¹ Before COLERIDGE, J., MAULE, J., WIGHTMAN, J., CRESSWELL, J., ERLE, J., WILLIAMS, J., and CROMPTON, J.

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liable to a penalty, as if he was a passenger who had not paid his fare. The plaintiff showed this pass to one of the servants of the defendants at the station, who said it was all right, and opened the door of the carriage for him to enter: —

Held, that there was evidence to go to the jury that the plaintiff was lawfully in the carriage.

THIS was a proceeding in error upon a bill of exceptions tendered to the ruling of Martin, B., at the Middlesex sittings, after last Easter term. The third and only material count of the declaration stated that the plaintiff was lawfully in a carriage on the defendants' railway, and that by their negligence he was injured. The defendants pleaded, thirdly, that the plaintiff was unlawfully, and not lawfully, in the said carriage. A verdict was found for the plaintiff, the learned judge having left it to the jury that there was evidence for them to say whether the plaintiff was lawfully in the carriage. The evidence, in effect, was as follows: The plaintiff was a reporter for "Bell's Life in London" newspaper, and attended races in that capacity. He generally travelled with a free pass, and had often travelled with one on the defendants' railway. He was so travelling to Lincoln races, in the usual course of his business, as such reporter, when the accident occurred. He showed the pass when demanded, but after the accident it had been torn up, and no witness spoke to its exact terms. The plaintiff could not recollect whether the words "granted to Mr. Langley — not transferable" were on the pass, but believed they were, and thought "Bell's Life" was upon it. The guard, one of defendants' servants, who saw the pass, let him into the carriage. W. Langley, one of the editors, stated that he sent the plaintiff to Lincoln; that he had given passes to reporters, who travelled with them; that he had travelled with passes in the name of "Ruff" and "Dowling;" the passes were sometimes made out in his name, and sometimes in that of "Bell's Life" only. Francis Dowling, to whom the ticket had been originally given, said he thought it was written upon it, that "any party other than the person named herein, using this pass, is liable to the penalties incurred by a passenger travelling without having paid his fare." He also said there was a memorandum upon it, that any one travelling not named in it, was liable to pay the fare. The defendants offered no evidence.

Bramwell, Q. C., (*Wordsworth* and *Clark* with him,) for the plaintiffs in error.¹ The evidence resolves itself into the ticket itself, the fact that the porter let the plaintiff below into the carriage, and the combined effect of the ticket and of the previous allowance of other persons to travel under similar circumstances. The ticket was no warrant for the plaintiff to travel, or for the porter to let him into the carriage, and there was no evidence of the defendants having been cognizant of passes having been used by persons not named in them.

¹ *Bramwell* was allowed to read the ruling of the judge at the trial from the shorthand writer's notes.

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[CRESSWELL, J. Suppose it had been "Bell's Life — not transferable" written on the ticket?]

Then it would have been explainable by usage.

He cited *The York, Newcastle, and Berwick Railway Company v. Crisp*, 23 Law J. Rep. (N. S.) C. P. 125; s. c. 25 Eng. Rep. 396; *Slim v. The Great Northern Railway Company*, ante p. 297; and *Skip v. The Eastern Counties Railway Company*, 23 Law J. Rep. (N. S.) Exch. 23; s. c. 24 Eng. Rep. 396.

Prentice, (*Shaw* with him,) for the defendant in error. It was shown that several persons from the office of "Bell's Life" had been accustomed to use these passes, and no objection was made until after the accident occurred. There was evidence of an implied license for the plaintiff to be there. A doctor from the company attended him.

[CRESSWELL, J. Any argument from that does mischief, and leads to cruelty; attempts are sometimes made, but should never be sanctioned, to press the attendance of medical men as an admission of liability.]

The plaintiff appears to have been known to the officials, and the company is bound by the acts of their servants. *The Taff Vale Railway Company v. Giles*, 23 Law J. Rep. (N. S.) Q. B. 43; s. c. 22 Eng. Rep. 202. It was competent for the company to waive the words "not transferable," like any condition introduced for their benefit, and the jury were entitled to presume a waiver. *The Mayor, &c. v. Johnson*, Lofft, 384. Whether the plaintiff was lawfully or unlawfully in the carriage is immaterial. *Davis v. Mann*, 10 M. & W. 546.

[COLERIDGE, J. The issue here is, whether the plaintiff was lawfully or unlawfully in the carriage, and no question of negligence arises in this case.]

Bramwell replied.

Cur. adv. vult.

July 3. Judgment was now delivered by

COLERIDGE, J. The question in this case arises on a bill of exceptions to the ruling of my brother Martin, with regard to the issue on the allegation in the third count of the declaration. The allegation was, that the plaintiff below was, at the time of committing the grievance complained of, lawfully in a certain carriage on a certain public highway. The plea to this count was, that the plaintiff below was at the time unlawfully, and not lawfully, in a certain carriage, as alleged in the declaration. It was objected, at the close of the case for the plaintiff, that there was no evidence to be submitted to the jury in support of it; that it appeared from the evidence tendered that the plaintiff was unlawfully in the carriage; and the learned judge ought so to have directed the jury, and ought to have decided it as matter of law, from the construction of a certain pass-ticket which had been given in evidence. The learned judge told the jury there was evidence for their consideration, and left to

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them the question whether, at the time of the committing the alleged grievance, the plaintiff was lawfully in the said carriage. We are of opinion that the ruling of the learned judge was right. The evidence in the case may be fairly taken to have amounted to this: There was a practice existing between the Great Northern Railway Company and the proprietors of "Bell's Life in London" newspaper, for their mutual convenience, that the former should allow the reporters of the latter, when going to country races on that line, for the purpose of framing their reports, to travel in their carriages free. The reporter was for that purpose supplied with a ticket, which on the face of it had written the name of the person in the reporting department other than the plaintiff, who was, however, himself in that department; it also purported on the face of it to be not transferable, and had a memorandum to this effect: That any party other than the person named in it using the pass would be liable to the penalty which a passenger incurs by travelling without having paid his fare, or should be liable to pay the fare; but it did not distinctly appear which of the two liabilities was stated in the memorandum; and if the former, it did not appear what the penalties were which were to be incurred. The plaintiff, acting *bonâ fide*, and going on the business of the journal, and entitled by the usage to the benefit of a ticket with his name on it, went to the station with a ticket such as we have described, and showed it to a porter at the station, whose business it was to examine the tickets, who said it was all right, and placed him in a carriage. There was no distinct evidence that he knew personally who the plaintiff was. It appeared that the plaintiff and other reporters had on several occasions before travelled with similar tickets, not bearing the names of those who used them; and there was evidence that the persons whose names were on the tickets were personally known to some of the officers and superintendents at the station. In considering this evidence, one of the questions we have to decide will depend on the sense in which we are to understand the issue. We think it does not arise on the point as to the lawfulness of the carriage being on a highway — that is, the railway — or, if it does, it is clear the carriage was there lawfully, as between the plaintiff and defendants. The point is, whether or not the plaintiff was in the carriage under such circumstances as that he must be considered a trespasser. Now, upon the issue so stated, we think the pass-ticket not so clear as to make the other circumstances wholly immaterial. The defendants might issue tickets in a form which did not permit others to use them, as being not transferable, and yet they might reasonably permit them to be used by other persons belonging to the same department, which permission would be a convenience to the newspaper proprietors, and a matter of indifference to themselves. The practice which had prevailed was not conclusive in this, because it was not conclusively shown to have been known by the defendants, or any officer, or that they themselves permitted it; but there was evidence of such knowledge on which the jury might find it to have existed; and if the jury were of opinion that this irregular use of tickets, however worded, was with

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the knowledge and permission of the superintendents of the station, who are placed there to regulate such matters, this would be such evidence of a license as would make it wrong to say the plaintiff was a trespasser in the carriage. Other considerations might arise on the language of the memorandum, if we knew it more certainly than we do; for if the plaintiff, by the use of the ticket, although unauthorized, only made himself liable to the payment of the fare, or for an increased fare, he could not be considered a trespasser. But without entering on these considerations, as to which the facts fail, it appears to us there was something for the jury, and that is all we need hold in order to decide that the judgment should be, as we think it ought to be, confirmed.

Judgment affirmed.

JONES and another v. GILES and another.

June 15, 1854.

Illegal Weights — Long Weight.

A contract for the sale of a number of tons of goods by "long weight," that is, tons of 20 cwt. of 120 lbs. avoirdupois each, is not a sale by an illegal weight within the 5 & 6 Will. 4, c. 63. Per CURIAM; *multum dubitante*, PARKE, B.

THE first count of the declaration alleged, that on the 19th February, 1852, the plaintiffs, at the request of the defendants, bought of them, who then sold to the plaintiffs, a large quantity, to wit, 250,000 lbs. weight of good puddle bar-iron, for the sum of 416*l.*; averring performance by the plaintiffs, and non-delivery by the defendants of the iron, and the lapse of a reasonable time, &c. The second count was on an agreement that the defendants should deliver to the plaintiffs four tons of puddle bar-iron in exchange for four tons of railway wheels, delivered by the plaintiffs to the defendants, &c. Pleas — First, *non assumpsit*. Secondly, to the first count, that the contract for the sale and purchase of the iron was made between the plaintiffs and the defendants after the passing of the act 5 & 6 Will. 4, c. 63, relating to weights and measures, and was for the sale and purchase of iron, to wit, 100 tons of iron, by the ton weight, long weight, that is to say, at a certain illegal weight, to wit, by the ton weight, consisting of 2,400 lbs. avoirdupois, being more than 20 cwt. of the standard weight in the said act mentioned, contrary to the form of the statute in that case made and provided. To the second count, the defendants pleaded payment into court of 32*l.* The plaintiffs took the money out of court, and took issue on the other pleas. At the trial, before Martin, B., a verdict having been found for the plaintiffs on the first, and for the defendants on the second issue,

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Hill, in Michaelmas term, obtained a rule to enter judgment *non obstante veredicto* on the second plea.

This rule, having been argued in Hilary term, was reargued in Easter term, on the 1st May, before POLLOCK, C. B., PARKE, B., PLATT, B., and MARTIN, B., when

Archibald, showed cause; and

Gray was heard in support of the rule.

The whole case appears in the judgment of the Barons; but in the course of the argument, counsel referred to 31 Edw. 3, c. 1; 22 Car. 2, c. 8; 5 Geo. 4, c. 74; 6 Geo. 4, c. 12; 4 & 5 Will. 4, c. 49; 5 & 6 Will. 4, c. 63; 16 Vict. c. 29; 49 Geo. 3, c. 59, local and personal; *Noble v. Durrell*, 3 T. R. 271; *Rex v. Major*, 4 T. R. 750; *Rex v. Arnold*, 5 T. R. 353; and *Tyson v. Thomas*, 1 M'Cl. & Y. 119.

Cur. adv. vult.

MARTIN, B. This was a rule for judgment *non obstante veredicto* on the second plea. After much consideration, I have not been able to satisfy myself that the plea is good. There is no ambiguity in its language which could be aided by the verdict, and the question simply is, whether a contract for the sale of 100 tons of iron long weight, being a phrase perfectly well known to mean tons of cwt. of 120 lbs. each, is illegal and void.

The question depends upon the construction of the statutes 5 Geo. 4, c. 74, and 5 & 6 Will. 4, c. 63.

By the 4th section of the first statute, the pound avoirdupois is enacted to be a certain specified fixed weight, but the weights denominated the stone, the hundred weight, or the ton, are not mentioned in the statute, although the use of them, as denominations of weight in the sale of goods, has been common for centuries. The 15th section enacts, that all contracts for the sale of goods by weight, where no agreement shall be made to the contrary, shall be deemed to be made according to the standard weight, and that where a special agreement shall be made with reference to any weight established by local custom, the ratio or proportion which every such local weight shall bear to the standard weight, shall be expressed in the agreement, otherwise the agreement shall be void. As has been already observed, the statute refers to the pound weight only, and declares it to be the standard weight; and I apprehend the true meaning of this section is, that if, for instance, two persons agreed to sell and buy 20 lbs. weight of any article, the law would conclusively put upon the contract the construction that it was for 20 lbs. standard weight, and no evidence as to the real meaning of the parties, that some local or customary pound was intended, would be admissible. And again, if, for instance, there had existed at Birmingham a local pound of either more or less weight than the standard pound, a contract for the sale

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of goods by the local pound would have been, and possibly still is, void, unless the ratio which it bears to the standard pound, was expressed in the contract itself. There was nothing, however, in this statute to prohibit a sale by an expression signifying any number of standard pounds — a sale of 100 lbs. of iron would be a lawful sale of 100 standard pounds; a sale of 1 cwt. of iron would be a lawful sale of 112 standard pounds; and a sale of 1 cwt. long weight would be a lawful sale of 120 standard pounds. It would only have been necessary to ascertain the true meaning of the expression used by the parties to the contract, and if it meant a certain number of pounds standard weight, it would have been legal. It is to be observed, also, that the 16th section of this statute permitted the use of weights, (meaning thereby the weight itself,) although not of the same weight as the standard, but provided that the ratio which they bore to the standard should be painted or marked upon them; and this for the purpose (as the statute expresses) that such ratio should become a matter of common notoriety.

This statute was made in 1824, and eleven years afterwards, (1835) the statute 5 & 6 Will. 4, c. 63, was passed. This statute seems to me to extend further the principle of the former one. The legislature seems to have considered that the enactments, by which it was provided that, in contracts of sale by local weight, the ratio between it and the standard weight should be expressed in the contract itself, and that all weights not of the standard should have painted or marked upon them the same ratio, after being in force and operation for eleven years, would have rendered familiar to the public what the imperial standard pound was; and accordingly, by the 3d section, the use of all weights different from the imperial standard (which had been permitted by the 6th section of the former statute) was from thenceforth prohibited.

The result of this enactment seems to me to be, that all weights whatever, which are different from the imperial standard, are now illegal, and that the only weights which the law permits to be used for actual weighing, is the imperial standard pound, or some multiple of it, or fraction of it.

This seems to me tolerably clear; but the difficulty in the present case, is as to the construction of the 11th section of the last statute. This section, after reciting that, by local custom in markets, towns, and other places throughout the united kingdom, the denomination of the stone weight varies, enacts that thenceforth "the weight denominated a stone, shall in all cases, consist of fourteen standard pounds avoirdupois; and that the weight denominated a hundred weight shall consist of eight such stones, and that the weight denominated a ton, shall consist of twenty such hundred weight: provided that nothing shall prevent any bargain, sale, or contract being made by any multiple or by some aliquot part, such as the half, the fourth, the eighth, or the one sixteenth of the pound weight."

Upon the best consideration I have been able to bestow upon the subject, I have arrived at the conclusion that the true object and meaning of this section was, to extend the provision contained in the

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15th section of the former statute. By this section, a statutory meaning is given to the word or denomination "pound (lb.)," and no evidence is admissible to show that the parties using it really meant and intended a weight different from the standard. By the 11th section of the latter statute, a statutory meaning seems to me to be given to the three words or denominations "stone," "hundred weight," and "ton;" and if, for instance, there existed in any particular part of the country, a stone called "the long stone," being of 16 lbs., and a contract was there made for the sale of a stone of any article by the long stone, the operation of the 11th section would be to affix an absolute statutory meaning to the word "stone," that the word "long" would be considered as of no avail, and that all evidence that the parties really meant 16 lbs. (pounds,) would be inadmissible, and the contract would in legal construction be deemed to be for 14 lbs. standard weight. If I am correct in this view as regards the word "stone," the same construction would, of course, apply to the words or denominations "long hundred" or "ton long weight," and, as applicable to the present case, the result would be that the sale was a lawful sale, but that the contract would be fulfilled by the delivery of 100 tons of iron of 2,240 lbs. avoirdupois each ton.

In the course of the argument, I was inclined to think that the 22d section rendered the contract illegal. Upon consideration, however, I am satisfied that it has reference to false and dishonest weight only, and has no bearing upon the present question. I think that what the law prohibits is the use of any pound other than the standard pound, and that all contracts for sale by weight, must be by this standard pound; and further, that if parties in contracts use the words or denominations "stone," "hundred weight," or "ton," they shall be conclusively taken to mean the weights mentioned in the 11th section; but if they use any other word or denomination of weight which, according to the ordinary rules of law, applicable to the use of words, means a multiple of the standard pound, it is my opinion that it is lawful for them so to do, and that a contract using such word is legal. This is in exact conformity with the judgment of the Court of Queen's Bench, delivered the other day in the case of *Lloyd v. Humphreys*, where the word "Hobbit" was used in a contract for the sale of wheat.

This construction of the statute would probably show that the plaintiffs would have been compelled to amend their declaration at the trial, if the objection had been taken that the contract alleged in it had not been proved. This objection, however, was not taken, and justice will be done if the damages are confined to the deficient delivery, calculating the iron as meaning 2,240 lbs., and not 2,400 lbs.

PARKE, B. This case has been fully argued before us, during Hilary and Easter terms last, and been the subject of much consideration by all of us.

It is clear that the plea was proved, for there is no question that the sale was by long weight, and that the meaning of the term "long weight," is 2,400 lbs. avoirdupois to a ton; therefore, there can be no

new trial. It was, indeed, contended, on the second argument by Mr. Gray, that the plea meant that the contract was for 100 tons long weight, expressed to be 240,000 lbs., which would be the same as if it had been for 240,000 lbs., and it then would be good. But, if that be the meaning of the plea, then it was not proved, and there should be a new trial.

But I think the meaning of the plea is, that the sale was by long weight, and that long weight meant 2,400 lbs. to the ton, so that it was not expressed to be 240,000 lbs. on the contract itself. The only question then is, whether that plea, understood in that sense, is good after verdict. This depends upon the construction of the 5 & 6 Will. 4, c. 63, taken in conjunction with the prior statutes relating to weights and measures. Does that act make the contract void?

I have felt great difficulty in coming to a conclusion as to the meaning of the legislature; but, after much consideration, I think that their intention must be taken to have been, to prohibit the sale by weights other than the standard weights designated in the statute, and long weight is not such a standard weight, and, consequently, that a contract to sell by that weight is void; for every contract prohibited and made unlawful by a statute is, therefore, void. Lord Holt, Carth. 252, cit. The plea is therefore, I think, good.

The act is one of a series, beginning with the 5 Geo. 4, c. 74, which repealed a great number of statutes, and was for ascertaining and establishing, as the title declares, uniformity of weights and measures; and the act recites, that "it is necessary for the security of commerce, and for the good of the community, that weights and measures should be just and uniform, and that the true measure of the present standard is not easily known, which is the cause of great confusion and of manifest frauds." Nothing can be clearer, therefore, than the intention of the legislature to have one uniform standard; and the use of terms in contracts, to describe both weights and measures other than those established by law, whereby confusion may arise, and frauds may be committed on strangers unacquainted with local usages, is within the same mischief. Whether it is actually prohibited by any of the statutes on this subject, is the question.

This act provides for what shall be the standard measure of weight, from which all others are to be ascertained and computed, namely, the standard pound; and, by section 9, all contracts for goods to be sold by weight, (except coals, &c.,) shall be according to that standard of weight, or parts, or multiples thereof. Then, the 15th section of the same statute provides, that all contracts, bargains, and sales, for goods by weight or measure, where no special agreement shall be made to the contrary, shall be deemed to be made and had according to the standard weights and measures ascertained by that act, and in all cases where any special agreement shall be made with reference to any weight or measure established by local custom, the weight or proportion which every such local weight or measure shall bear to any of the said standard weights or measures, shall be expressed, declared, and specified in such agreement, or otherwise such agreement shall be null and void. The 16th section provides that weights and

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measures not in conformity with the said standard weights and measures, but established by local custom, or founded on special agreement, may be used, provided that the ratio, which they bear to the standard weights and measures, shall be marked thereon. This section applies to the actual use of specific weights and measures in weighing and measuring.

Upon this statute it is clear that any agreement to sell by a customary pound, or any multiple of a customary pound weight, is absolutely void, unless the ratio it bears to the standard pound is expressed in the contract. But the statute does not, in express terms, apply to the sale by a customary stone, quarter, hundred weight, or ton, although such sales are clearly within the same mischief.

I will next consider what the effect of the subsequent statute 5 & 6 Will. 4, c. 63, is.

The act begins by repealing the statute 4 & 5 Will. 4, c. 49. By the 11th section, which recites that "by local customs in markets, towns, and other places, the denomination of stone weight varies," it is enacted, that "from and after the passing of this act, the weight, denominated a stone, shall in all cases consist of 14 lbs. avoirdupois, and that the weight denominated a hundred, shall consist of eight such stones, and that the weight denominated a ton, shall consist of twenty such hundreds: provided always, that nothing herein contained shall prevent any bargain, or sale, or contract, being made by any multiple, or by some aliquot part, such as the half, the quarter, the eighth, or the sixteenth part of the pound weight." Now, this section comes in place of the 12th section of the repealed statute, 4 & 5 Will. 4, c. 49, which is as follows: "And whereas, by local customs, in the markets, towns, and other places throughout the United Kingdom, the denomination of the stone weight varies, being in the country generally deemed to contain 14 lbs. avoirdupois, and in London commonly eight of such pounds, and otherwise as may be: be it therefore enacted, that from and after the 1st January, 1835, the weight denominated a stone, shall in all cases consist of fourteen standard pounds avoirdupois, and that the weight denominated a hundred weight, shall consist of eight such stones, and that the weight denominated a ton, shall consist of twenty such hundreds, and all other contracts made by any other stone, hundred, or ton, from and after the 1st January, 1835, shall be null and void." It will be seen that this section expressly avoids all contracts by any other than the statutory stone, hundred, or ton, whereas the corresponding section, in the 5 & 6 Will. 4, does not provide in express terms that the contract shall be void. This affords undoubtedly a strong argument that the legislature, in the latter act, did not intend this consequence to follow. But, then comes the question, whether, notwithstanding the want of the express enactment in this particular clause, the intention of the legislature can be sufficiently collected from the different provisions of the act, coupled with some of the provisions of the old act, to prohibit such contracts; and if they do prohibit them, no court of law can enforce them. I have come to the conclusion that this is to be collected from different parts of the two acts.

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In the first place, the 11th section above recited, going beyond the recital, which states the discrepancy of the stone only, (and enactments very often go beyond their recitals,) provides that the hundred shall in all cases, that is, in all cases of contracts, consist of eight stones of 14 lbs., and a ton of twenty such hundreds; and it follows that in every case it shall not consist of any other number of pounds than 112 lbs., to the hundred, and twenty times that amount to the ton; and in effect it prohibits contracts for any other description of hundred or ton. The proviso shows clearly that the section relates to all bargains, sales, and contracts, and excepts out of them, *pro majori cautela*, contracts by the multiple, or aliquot parts of the pound standard; and if such contracts are prohibited it is clear that they cannot be enforced in a court of law, though they are not expressly declared to be null and void. And this provision as to weight agrees with the principle of the 6th section, whereby all local and customary measures are abolished, and parties are liable to a penalty for selling by them. This shows that contracts to sell by other than the statutory measures are incapable of being enforced; for it is so, generally speaking, if subject to a penalty — courts of law cannot enforce a contract which is meant to be prohibited by a penalty. If this is intended, as it I think clearly is, with respect to measures, can any reason be assigned for not prohibiting sale by customary weights? And this agrees with the unrepealed part of the 5 Geo. 4, c. 74; for it will be found upon a careful comparison of the two acts, 5 Geo. 4, c. 74; and 5 & 6 Will. 4, c. 63, that section 15 of the former act is unrepealed. It is clearly the 16th section which is repealed by the 5 & 6 Will. 4, and not the 15th, and the unrepealed 15th section clearly renders void the sale by special agreement, by weights established by local custom, unless the agreement specifies the proportion that the local customary weight bears to the standard weight.

It is said that this statute, 5 Geo. 4, only provides for the standard pound and its multiples, not for the quarter, hundred, or ton. Admitting that it does so, it still forms a strong ground for giving a similar construction to the 11th section of the 5 & 6 Will. 4, for if a sale by every customary pound is prohibited and rendered void, what reason can be given for not prohibiting the sale by hundred or ton? The 21st section enacts, that "Every person who shall use any weight or measure; other than those authorized by this act, or some aliquot part thereof, as hereinbefore described, or which has not been so stamped as aforesaid, except as hereinafter excepted, or which shall be found light or otherwise unjust, shall, on conviction, forfeit a sum not exceeding 5*l.*; and any contract, bargain, or sale made by any such weights or measures shall be wholly null and void, and every such light or unjust weight and measure so used shall, on being discovered, by any inspector so appointed as aforesaid be seized, and on conviction of the person using or possessing the same, shall be forfeited." The immediate object of the 21st section probably was to prohibit the use of, and contracts for a sale by, certain specific weights, which are not according to the act, or are not properly stamped; and if the case depended upon that section alone, and there were no other provisions

on the subject of contracts, I think sales by customary weights would not be prohibited. But this provision makes the whole system complete.

To secure against confusion and fraud, the use in weighing and measuring, of all unauthorized weights and measures to weigh and measure by is prohibited. All contracts by such specific weights and measures, as for instance where a vendor had such unauthorized weights and measures in his possession, and contracted to sell by them; and, lastly, all contracts by the pound, stone, hundred, ton, &c., and by the foot or yard or gallon — customary or local measure — are prohibited. I think, therefore, that it appears sufficiently that this particular contract is forbidden, and, consequently, is void.

It occurred to me, in the course of the argument, that the 11th section of the 5 & 6 Will. 4, might be explained to mean, that if there was a contract to sell by the stone, or hundred, or ton, without any mention of customary weight, it should be held to mean that the weight should be 14 lbs., 112 lbs., and 2,240 lbs., respectively. (That is clear.) And that if the parties stipulated for a customary stone, or a customary hundred or ton, the contract should be interpreted, against the meaning of the parties, to be for the statutory weight only. I think, however, that this would be an unreasonable construction. If the contract prohibited is illegal, both parties are in equal fault, and are equally punished if it be held void, as it must be; neither can the vendor oblige the vendee to take, nor can the vendee oblige the vendor to deliver; and if the vendor chooses to deliver (being presumed to be conversant with the law) he suffers by his own fault. But if the contract be held valid in a different sense from that of the contractors, the punishment is unequal. If the contract be for customary stones, (8 lbs. each,) the purchaser gains 6 lbs. on each stone, and so punishes the vendor by obliging him to deliver so much. On the other hand, if the contract be for long weight, the vendor gains, and so punishes the purchaser for having agreed to sell 2,400 lbs., and he is entitled to the price if he delivers only 2,240 lbs. I think the legislature never could have intended what appears so very unreasonable. Of course, they might have enacted that such should be the consequence in express terms — but they certainly have not done so.

One more observation remains. The proviso in this 11th section, that contracts may be made by a multiple or aliquot part of a pound, cannot, in my opinion, be applied to such a case as this, on the ground that long weight being known to be 2,400 lbs. weight to the ton, the parties may be taken to have contracted for a multiple of 120 lbs., as they contracted for tons. To bring this case within the proviso, they should have contracted for so many parts of pounds, or statutory multiples of pounds, as stones, hundreds, tons. To allow the customary weight to be translated into pounds is to defeat the object of the legislature, which appears by the recital of the 5 Geo. 4, and in the recital to that section also, to be to prevent disputes about customary weights, which vary in different places. It is true, the section recites a variation by local custom as to the stone only, but the section provides also for hundreds and tons, which are in the same mischief. A con-

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tract with a stranger in the market, or with a person in a distant part of the kingdom, would be likely to generate a dispute, as to the contract being according to the custom or not, and as to the quantity of the customary weight.

I have come to the conclusion, for the reasons I have stated, that the contract was void, and that the plea is good, and consequently that the plaintiffs are not entitled to judgment. But I will add, that, since I prepared my judgment in this case, I have heard that the Court of Queen's Bench, a few days ago, decided a similar case, on the question of a sale of wheat by "Hobbit," on the ground that the statutes did not apply to sales by weight. I think we should hold such decision to be binding, though I cannot learn that the provisions of these complicated and not very intelligible statutes, were fully brought before them. The verdict, therefore, must remain for the defendants on the second plea, and the judgment *non obstante verdicto* on that plea entered for the plaintiffs.

POLLOCK, C. B., and PLATT, B., concurred in the view of Martin, B.; the former adding that he formed his judgment on the construction of the statutes alone, and independently of the decision of the Queen's Bench in *Lloyd v. Humphreys*; but that he was extremely glad the point was on the record, and consequently might be brought before a court of error.

Rule absolute.

IN THE EXCHEQUER CHAMBER.

PALMER and another v. NAYLOR and others.¹

June 16 and 17, and July 3, 1854.

Insurance — Perils of the Sea — Mutiny — Proximate Cause.

To a declaration on a policy of insurance on advances for the transport of Chinese emigrants from China to Peru, for their outfit and provisions, to be paid on the arrival of the emigrants at the port of destination, the perils insured against being "pirates, rovers, thieves, &c., barratry of the master and mariners, and all other perils, losses, and misfortunes," &c., (in the usual form,) the declaration alleging a total loss, by the emigrants piratically and feloniously murdering the captain and part of the crew, and feloniously stealing and carrying away the ship, the defendants pleaded, first, that as soon as the emigrants had committed the murder, and had obtained possession of the vessel, they steered for the nearest land, for the purpose of being landed, and refused to and could not proceed upon the voyage; and the vessel was then fit and able safely to proceed to the

¹ Before COLERIDGE, J., MAULE, J., WIGHTMAN, J., CRESSWELL, J., ERLE, J., WILLIAMS, J., CROMPTON, J., and CROWDER, J.

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said port, and the remainder of her crew could have navigated her there, and were ready and willing to convey the emigrants there if they would have gone, but that they would not; and that by reason of that refusal, and for no other cause whatever, the transport was never completed. Secondly, as to the taking and carrying away of the vessel, that the emigrants were unwilling to be carried on the said voyage, and that they committed the murder, and took possession of the vessel, for the purpose of being landed and of escaping, and from being carried on the voyage, and for no other purpose, which is the said piratical carrying away of the vessel: —

Held, affirming the judgment of the Court of Exchequer, that the pleas were bad, as the loss was complete as soon as the emigrants forcibly took possession of the vessel; and that the loss being referable to that act, the motive which led to it was immaterial.

THIS was a proceeding in error by the defendants below upon a judgment of the Court of Exchequer, given on demurrer to two pleas.¹ The action was upon a policy of insurance. The declaration stated that the policy was executed by the defendants below, as two of the directors of the Indemnity Mutual Marine Assurance Company, for 5,000*l.*, part of 12,500*l.* specie, produce merchandise, on advances, as interest might appear, the advances being intended to cover cost of transport, provisions, and other expenses incurred for the transport of Chinese emigrants, general average, &c., from any port or ports in Canton waters, Amoy, and Manilla, to any port or ports in Peru, or *vice versa*, with leave to call at all ports and places, &c., the insurance to commence upon the said ship at and from and until she had moored at anchor twenty-four hours in good safety, at and upon the freight and goods or merchandise on board thereof, from the loading of the same on board the said ship until they should be discharged and safely landed as aforesaid. The declaration then proceeded to state the perils insured against to be “of the seas, men of war, fire, enemies, pirates, rovers, thieves, jettisons, letters of marque, and coverte marque, surprisals, taking at sea, arrest, restraints, and detainments, and detainments of all kings, princes, and people, of what nation, condition, or quality soever, barratry of the master and mariners, and all other perils, losses, and misfortunes that had and should come to the hurt, detriment, or damage of the aforesaid subject-matter of that insurance, or any part thereof.” The declaration then averred, that by a memorandum indorsed on the policy as the declaration of interest, it was agreed that the amount of the expense of transport to be covered under that policy should be fixed at the rate of 8*l.* 15*s.* for each coolie embarked. The declaration then proceeded to state, that, after the making of the said policy, 360 Chinese emigrants or coolies were, by the agents of the persons interested in the insurance, shipped on board a ship called *The Victory*, lying in a port in the Canton waters called Cum-singmoor, to be carried to Callao, in Peru, for money to be paid to the persons interested in the insurance on the safe landing of each of the said emigrants at the end of the said voyage; and that a large sum of money, amounting to, &c., had been advanced by the agents of the persons interested as the cost of the transport and

¹ Reported in the court below, 8 Exch. 739; s. c. 22 Eng. Rep. 573.

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provisions shipped on board the said vessel, and other expenses incurred for the transport of the said Chinese emigrants or coolies; that such advances were necessary for the said transport, and to earn certain money, to be earned on the safe arrival of each of such Chinese emigrants in Peru; and that the amount of the said money so to be earned on such delivery of the said Chinese emigrants, and which would have been paid on such delivery, greatly exceeded the amount of such advances; that afterwards the said ship called *The Victory* sailed on her voyage towards the said port of Callao with the said Chinese emigrants or coolies, and provisions on board thereof; and that whilst she was proceeding on her voyage, and before her arrival at her destination, and while she was on the high seas, the said Chinese emigrants piratically and feloniously assaulted and murdered the captain of the ship and divers of the crew, and piratically and feloniously, by force, took, stole, and carried away the said ship, and the provisions and cargo of the said ship, from the care, custody, and possession of the said captain and crew thereof, and forcibly and against the will of the said crew carried the said ship away; whereby and by reason of which piracy and theft the said ship was hindered and prevented from arriving, and never did arrive, at the end of her said voyage, and the said transport of the said coolies never was completed, and the said advances so insured by the said policy, and all benefit and advantage therefrom, became and were wholly lost to the insured, &c. To this declaration the defendants pleaded, eighthly: "That as soon as the said Chinese emigrants had so murdered the said captain and some of the crew, and obtained possession of the said vessel, they caused the same to be steered to the nearest land, for the purpose of being landed, and refused to, and would not, and did not proceed on the said voyage or transport; and the said vessel then was fit and able to proceed to the said port, and convey the said Chinese emigrants there; and that afterwards, within a few days, they reached the land, and then, and because they would not proceed on the said voyage, they landed and wholly left the vessel, and refused to proceed upon the said voyage and transport; and that the said vessel, when so left by them, was fit and able safely to sail and proceed to the said port of Peru; and that the crew of the said vessel and the mate of the said vessel had then the possession of the same, and could have safely navigated the said vessel to the said port of her destination, and were ready and willing to sail to the said port, and to convey and transport the said Chinese emigrants to the said port if they would have gone there, but that they would not, nor would any of them, do so; by reason of which said refusal, and for no other cause whatever, the said transport of the said Chinese emigrants was never completed, as in the declaration mentioned." The defendants pleaded, ninthly, as to the taking and carrying away of the said vessel, that the said Chinese emigrants were unwilling to be carried on the said voyage to the said port, and that they murdered the said captain and some of the crew, and took possession of the said vessel, for the purpose of being landed and escaping from the said vessel, and from being carried on

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the said voyage, and for no other purpose, which is the said supposed piratical carrying away the said vessel in the declaration mentioned. Upon demurrer to each of these pleas judgment had been given for the plaintiffs by the Court of Exchequer.

Bramwell, Q. C., (*Wilde* with him,) for the plaintiffs in error, (the defendants below.) It was admitted that this was not an insurance on the ship, which indeed is safe, nor for advances properly so called, that is, provisions. This is, in fact, an insurance upon the coolies, and the defendants are to pay for each of them that does not arrive at his destination by reason of the perils insured against. The coolies were shipped, but were unwilling to proceed on the voyage; they therefore murdered the captain and a part of the crew, and took the ship to a port and left her there; their unwillingness to proceed being the cause of each act, and so they do not arrive at Peru. But "*causa proxima*," "*non remota*," "*spectatur*," and "*proximate*" must mean the immediate antecedent. *Tatham v. Hodgson*, 6 T. R. 656; *Livie v. Janson*, 12 East, 648; *Hadkinson v. Robinson*, 3 B. & P. 388; *Jones v. Schmoll*, 1 T. R. 130, note. Assuming the conduct of the Chinese emigrants to have been piratical, and so to have come within one of the perils insured against, their unwillingness to proceed was the cause of that conduct, and that unwillingness continued up to the time of the loss. If the vessel had been taken to a port by pirates, and the coolies had then left, that would not have been a loss of the coolies by piracy. This is not an act of piracy insured against; the insurance in effect is, that no pirate shall prevent the ship or goods from arriving; and if this be an insurance on goods, then it is on the very pirates themselves, and it must be contended on the other side that the underwriters insured that the coolies would not become pirates; in other words, that they were the guarantors of their fidelity.

[WILLIAMS, J. They are not themselves insured, but their arrival is.]

But, again, this was not a piratical act, nor *ejusdem generis*; as regards the men, it could not be one. "Thieves" means thieves extrinsic; the barratry of master and mariners is an extrinsic peril. The murder of the master was a felony, but the taking the ship merely with a view to escape was not a felony.

[CROMPTON, J. It would be matter to go to the jury whether they intended to steal it or not.]

Piracy is defined in Emerigon, c. 7, s. 28.

Blackburn, (*Knowles*, Q. C., with him,) for the defendants in error. The question is, whether the loss accrued by one of the perils insured against. Piratical seizure gives a right to recover as for a total loss, unless the owners subsequently have possession or the means of possession. *Dean v. Hornby*, 3 El. & Bl. 180; s. c. 24 Eng. Rep. 85. Is the adventure continuing? would seem to be the question. What was the cause that produced the loss? At the instant of the coolies seizing the vessel the venture ceased. It was said on the other side that subse-

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quent circumstances reduced the total to a partial loss. *Roux v. Salvador*, 3 Bing. N. C. 266, 278. *Green v. Elmslie*, Peake, 278, was a case of insurance against capture only, and was decided on the ground of a partial loss, and that the ship was not taken out of the possession of the insured. *Bondrett v. Hentigg*, Holt, 149; *Hahn v. Corbett*, 2 Bing. 205. Was the relation which the underwriters contracted to protect subsisting at the time of the loss? As to passengers not being pirates, reference may be made to *Nesbet v. Lushington*, 4 T. R. 783, and 2 Arn. Ins. 318. Piracy may be committed by the crew or passengers. The unwillingness to proceed was the *causa remota*, the impulsion to rising in mutiny. Emerigon, c. 8, s. 4; c. 12, s. 10; 1 Ph. Ins. 670.

Bramwell, in reply, cited Emerigon, c. 12, s. 28, and Pothier's Cont., by Estrangan, 107, commenting on the passage from Emerigon.

Cur. adv. vult.

July 3. The judgment of the court was now delivered by

COLERIDGE, J. We have considered this case, and are of opinion that the judgment of the court below must be affirmed, for reasons which we need not state at any great length. In the first place, it has never been contended that the loss, supposing it to have resulted from the causes stated in the declaration, even admitting that modification introduced by the eighth and ninth pleas, was not attributable to the perils stated in the declaration. If it is stated to be the act of the Chinese emigrants, it was the proximate and not merely the remote cause of the loss. It is admitted that the seizure of the vessel, by their taking her out of the power and control of the master and the crew, and diverting her from the voyage, was either a direct act of piracy, or an act so entirely *ejusdem generis*, that if not deduced from the general words of the policy, they are included in the general words at the foot of the peril clause. The question, then, arises upon the pleas; and the principle, that the proximate cause was to be looked to, was admitted and insisted upon by both sides in the argument. The decision of this case depends entirely on the question of fact, what occasioned the loss? This may be answered by determining another; when did the loss occur? If no loss occurred until after the coolies had restored to the mate and crew the possession and control of the vessel, she being at that time in a fit condition to prosecute the original voyage, and carry them to their destination, their not being so carried to their destination might be referable certainly to the unwillingness to be so carried; but if the loss was complete as soon as they murdered the captain, and had forcibly taken possession of the vessel, and for a time put an end to the voyage, then the loss of the vessel was referable to that act, and the motive which induced them to commit it, namely, their unwillingness to be carried to their original destination, is immaterial to

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be considered. The court consider the latter to be the true view of the case; and on this short ground the judgment of the court below must be affirmed.

Judgment affirmed.

TAYLOR v. THE CROWLAND GAS AND COKE COMPANY.

May 26, and June 16, 1854.

Joint-Stock Company — Liability after complete Registration — Certificated Conveyancer.

A joint-stock company completely registered is liable to be sued upon contracts made with the company during the period of provisional registration, provided such contracts are within the powers conferred by the 7 & 8 Vict. c. 110, s. 23.

A person who is not within any of the exceptions specified in the 44 Geo. 3, c. 98, s. 14, cannot recover for his services in drawing or preparing any conveyance or deed relating to any real or personal estate or any proceedings in law or equity.

THIS was an action for work and labor performed by the plaintiff as secretary for the defendants.

Pleas — Never indebted. Secondly, as to the claim for work done and materials provided, and for money found to be due on account stated, the defendants say that the said work and materials were done and provided in and about and for the purpose of the plaintiff, directly and indirectly, drawing and preparing conveyances and deeds relating to real and personal estate, and proceedings at law and in equity, for and in expectation of fee, gain, and reward, contrary to the form of the statute in such case made in the 44th year of the reign of King George the Third, c. 98, he, the plaintiff, not being a sergeant at law, barrister, solicitor, attorney, notary, proctor, agent, or procurator, having obtained a regular certificate; nor a special pleader, draftsman in equity, or conveyancer, being a member of one of the four inns of court, and having taken out the certificate in that behalf required; and not being a person solely employed to engross any deed, instrument, or other proceeding, not drawn or prepared by himself, and for his own account respectively; and not being a public officer drawing or preparing any official instrument applicable to his office and in the course of his duty; and none of the said conveyances, deeds, and proceedings being a will or other testamentary paper, or an agreement not under seal, or a letter of attorney. That the accounts were stated concerning the fees, gains, and reward claimed by the plaintiff for the said work and materials, and the money found to be due upon such accounts, was such fees, gains, and reward.

Demurrer and joinder.

The issues, in fact, were tried first; and, at the trial, at the Sittings for Middlesex, after Hilary term, before the Lord Chief Baron, it appeared

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that the claim was for services rendered by the plaintiff to the defendants as secretary between the period of their provisional and complete registration; and it was admitted that the services were necessarily required for the establishing of the company, within the meaning of the 23d section of the 7 & 8 Vict. c. 110. It was objected that the completely registered company were not liable. A verdict was found for the plaintiff, with leave to the defendants to move on this point.¹

A rule *nisi* was subsequently obtained, against which

May 26. *Chambers* and *Tapping* showed cause. There is no foundation for the objection that a completely registered company is not liable for necessary contracts made between the provisional and complete registration. It is not denied in this case, that the work performed by the plaintiff was necessary; and the contract expressly or impliedly made between the plaintiff and the defendants, was within the powers of the provisionally registered company, under the 7 & 8 Vict. c. 110, s. 23. But that section, by empowering a provisionally registered company to make contracts, impliedly makes the company, when completely registered, liable on such contracts.

[ALDERSON, B. 'The butterfly is responsible for the obligations of the chrysalis.']

In *Barton v. Hutchinson*, 2 Car. & K. 712, it was held that the promoters may be liable personally, but so far from excluding the liability of the company, Maule, J. is there reported to have said that "the company might sue by their public officer, upon contracts entered into before complete registration;" and if so, they can also be sued. *Hutchinson v. The Surrey Consumers Gas Company*, 11 Com. B. Rep. 689; s. c. 7 Eng. Rep. 474, was relied on when the rule *nisi* was obtained; but it is no authority for the non-liability of the company. The decision was, that the company was not liable on contracts made before provisional registration, and the *quære* in the marginal note, as to the liability of the completely registered company, is not supported by the case. They referred also to *Terrel v. Hutton*, 23 Law J. Rep. (N. S.) Chanc. 345.

Seymour, contra. The company was not incorporated at the time of this work being done, and had no legal existence. The act of parliament gives no express power to sue the new body for the debts of the provisionally registered body, and none can be implied, especially as *Barton v. Hutchinson*, shows that the contracting parties have their remedy against the promoters who made the contract. He referred also to *Hutchinson v. The Surrey Gas Consumers Company*.

¹ This statement of the facts is all that is necessary for the points decided, and the matter is not finally disposed of, there being some difference between the parties as to the amount for which the verdict was to stand.

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ALDERSON, B. I have no doubt about it. It is a parliamentary mode of making one body responsible for the contracts of another. The promoters have become provisionally registered by the particular name, and they have power under certain limitations to bind other persons. It is clear the company, after complete registration, may sue upon beneficial contracts made by the company when provisionally registered; and it is, therefore, right that those who have the benefit should also bear the burden.

POLLOCK, C. B., and PLATT, B., concurred.

The case then stood over upon a minor point, until after the decision upon the demurrer. This was argued at the Sittings after Trinity term, (June 16.)

Tapping, in support of the demurrer. The question turns upon the true construction of the 44 Geo. 3, c. 98, s. 14.¹ At common law, any person could draw conveyances and recover for his skill and labor, and until the statute just referred to, there was no legislative interference on the subject. Being in derogation of the common law, and inflicting a penalty, it must be construed strictly. It was passed for revenue purposes only, and the penalty is imposed as a means of securing the certificate being taken out. The words are not negative, but merely that every person who shall, &c. *Cope v. Rowlands*, 2 Mee. & W. 157, is in favor of the plaintiff. The court there said: "The sole question is, whether the statute means to prohibit the contract? In the cases of *Brown v. Duncan*, 10 B. & C. 93; and *Wetherell v. Jones*, 3 B. & Ad. 221; both cases of violation of the revenue laws, the particular contract sued upon was held not to be interdicted; and in *Johnson v. Hudson*, 11 East, 180, as explained in the judgment of the Court of King's Bench, in *Forster v. Taylor*, 5 B. & Ad. 898, the provision of the statute, which requires persons dealing in tobacco to take a license, was held to be a regulation attaching to the plaintiff personally, and affecting him with the pen-

¹ That section enacts, "That every person who shall, for or in expectation of any fee, gain, or reward, directly or indirectly draw or prepare any conveyance of, or deed relating to, any real or personal estate, of any proceedings in law or equity, (other than and except sergeants-at-law, barristers, solicitors, attorneys, notaries, proctors, agents, or procurators, having obtained regular certificates, and special pleaders, draftsmen-in-equity, and conveyancers, being members of one of the four inns of court, and having taken out the certificates mentioned in the said schedule to this act annexed, at the head office in London of the commissioners for managing the duties on stamped vellum, parchment, and paper, and other than and except persons solely employed to engross any deed, instrument, or other proceedings not drawn or prepared by themselves, and for their own account respectively, and other than and except public officers drawing or preparing official instruments applicable to their respective offices and in the course of their duty,) shall forfeit and pay for every such offence the sum of 5*l.* : Provided always, that nothing herein contained shall extend, or be construed to extend, to prevent any person or persons drawing or preparing any will or other testamentary papers, or any agreement not under seal, or any letter of attorney."

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alty, for the purpose of securing the license duty only, and not forbidding the contract itself; though it is to be observed that some little doubt has been thrown on the particular case in a very learned work, 2 Stark. on Evidence. The principle, however, of that decision, as above explained, is correct; and the question for us now to determine is, whether the enactment of the statute 6 Ann. c. 16, (altered as to the amount of penalty, by 57 Geo. 3, c. 60,) is meant merely to secure a revenue to the city, and for that purpose to render the person acting as a broker, liable to a penalty if he does not pay it? or whether one of its objects be the protection of the public, and the prevention of improper persons acting as brokers? On the former supposition, the contract with a broker for his brokerage, is not prohibited by the statute—on the latter it is; for it cannot be permitted to a person to recover compensation for an act which the law interdicts him from doing.”

[PARKE, B. The distinction taken in some of the cases between revenue statutes and others, is not sound. The true principle is laid down in *Smith v. Mawhood*, 14 Mee. & W. 452.

ALDERSON, B. The section speaks of a violation of its provisions as an offence; surely, that shows that the act is prohibited.]

The same word was used in the 29 Geo. 3, c. 68, as to the sale of tobacco without a license, but the contract was held to be legal. *Johnson v. Hudson*. The validity of the present contract is supported by what Gibbs, C. J., said in *Edgar v. Hunter*, Holt, N. P. 528: “As to this very section, I am inclined to think with my brother Copley, that the agreement would not, therefore, be invalid, though the plaintiff might not subject himself to a penalty.”

Hayes, contra. The principle is now admitted, that if the statute prohibits the contract, it is illegal, and this whether the object of the statute be for revenue or for any other purpose. Here the object of the statute, as shown by the exceptions, was, to prevent unqualified persons from acting as conveyancers; for the exceptions are, all persons who might be presumed to be qualified, such as sergeants at law, &c.

[ALDERSON, B. And the provision that certain matters, such as wills, may be drawn, inferentially prohibits the drawing all conveyances and deeds not within that provision.]

(He was then stopped by the court.)

Tapping, replied.

PARKE, B. The defendants are entitled to judgment. The general principle is agreed upon, and my present impression is, that the statute does prohibit the act. It is, therefore, illegal, and the plaintiff cannot recover in respect of it. The object of the statute seems to have been to secure competent persons by instituting a qualification, and, therefore, the act is prohibited.

ALDERSON, B. I am of the same opinion. The words of the proviso

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clearly show that the intention of the legislature was to prohibit the drawing of conveyances by persons not certificated.

PLATT, B. The object of the act was also to protect the public from the designs and professed skill of ignorant persons, who, other than those referred to by the act of parliament, may attempt to practise conveyancing without being in the profession, or acquiring sufficient information and knowledge upon the subject.

MARTIN, B., concurred.

Judgment for the defendants.

IN THE EXCHEQUER CHAMBER.

BUSH v. FOX and others.¹

February 2, 1854.

Patent — Specification — Construction of Claim — New Manufacture.

A patent had been obtained for improvements in the means and apparatus for working under water, in order to produce excavations and building foundations of light-houses, piers, jetties, and other structures under water. The specification described a cylinder or caisson of iron, divided into compartments and chambers, which was to be sunk to the bottom of the water, in the place where the foundation was to be made. The water was to be forced out and kept out of the caisson by an air-pump, so that, by means of the valves and passages specified, workmen might descend within the caisson and excavate at the bottom, and send up the materials to the surface through it. When a sufficient depth was attained, the foundation was to be laid, and built up of concrete or other materials within the caisson, each chamber of which was to be thus filled in turn, until the surface was reached; and the lower portion of the caisson itself was to be left as part of the permanent foundation, inclosing the solid mass of concrete or stone. The specification concluded by saying that the inventor claimed the mode of constructing the interior of a caisson in such a manner that the work-people might be supplied with compressed air, and be able to raise the materials excavated, and to make and construct foundations of buildings as above described. In an action for infringement of the patent, it was pleaded that the invention was not any manner of new manufacture, and the defendants proved that a patent had been obtained for a caisson similar in its construction, but which was to be applied to facilitate excavating, sinking, and mining, by keeping out, by means of the compressed air to be forced in, any water that might be met with during the operations :—

Held, that the inventor claimed the construction of the caisson itself, and that, as this was not new, the judge was right in telling the jury that the invention was not a new manufacture.

This was a writ of error by the plaintiff, on a bill of exceptions to the ruling of Pollock, C. B., in favor of the defendants.

The action was for the infringement of a patent.

¹ *Coram* COLERIDGE, J., MAULE, J., CRESSWELL, J., WIGHTMAN, J., WILLIAMS, J., and CROMPTON, J.

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The third plea was, that the supposed invention of the plaintiff was not an invention of any manner of new manufacture. On this plea issue was taken.

On the trial, on the 10th of December, 1852, at the Guildhall, London, before Pollock, C. B., the plaintiff's specification was put in, which showed that the patent was for an invention of "Improvements in the means of and in the apparatus for building and working under water." It further stated: "My invention relates to means and apparatus for working under water, in order to produce excavations and building foundations of light-houses, piers, jetties, and other structures under water." The specification contained drawings of the plaintiff's invention, with a written description explaining the separate figures; and it described a caisson of iron, divided into compartments and chambers, which was to be sunk into the water; the lower chambers to be open, and when sunk to the bottom to have air supplied by means of an air-pump, as in a diving-bell, for the use of the workmen, who were to excavate the soil, and send it to the surface in buckets; and then, when the caisson had sunk low enough, to build in a firm foundation of concrete or other materials, gradually filling the chamber. The method of enabling the men and buckets to pass from one chamber to another, without allowing the water to come in, was shown in detail, and the valves and air-chambers and air-cocks particularly described. When the lowest chamber was filled, the partition between it and the one above was to be removed, and the building carried on inside until the second chamber was also filled. Proceeding thus, the foundation was gradually to rise to the surface of the water, having the lower portions of the caisson left as a portion of the foundation. The specification concluded: "Having thus described the nature of my invention, and the manner of performing the same, I would have it understood that I do not confine myself to the precise details shown, provided the peculiar character of my invention be retained; but what I claim is, the mode of constructing the interior of a caisson in such a manner that the work-people may be supplied with compressed air, and be able to raise the materials excavated, and to make and construct foundations and buildings as above described."

The plaintiff was called as a witness, and stated that he was an engineer, and had had his attention directed to the importance of making works on the Goodwin Sands, and of building structures under water in places of that description, and he described his invention (according to a model produced) as that of a caisson made airtight and hollow, from which the water was to be forced by means of an air-pump, after which, when it had been sunk low enough, it was to be filled in solid with concrete and masonry, and left as part of the permanent foundation; and he complained that the defendants had infringed his patent in building the foundations of Rochester Bridge, which were made of iron cylinders, sunk, worked, and filled with concrete, in a similar manner to that described in the plaintiff's specification.

In order to make out their plea, the defendants put in evidence the

specification of a patent of Lord Dundonald, for the invention of "apparatus to facilitate excavating, sinking, and mining," in which he stated: "My invention consists of an apparatus hereinafter described for compressing atmospheric air into, and retaining the air so compressed within the interior capacity of subterranean excavations, sinkings, or mines, or without those portions of that capacity, where the operations of excavating, sinking, or mining are going on, in order that the additional elasticity given to and maintained in the included air by aid of my apparatus, over and above the ordinary and natural elasticity of the atmospheric air, which is contained in excavations and mines, may counteract in part or wholly the tendency of superincumbent water, or of such superincumbent earth as is rendered semi-fluid by admixture with water to flow by gravitation into such excavations which, as aforesaid, are filled with compressed air, and maintained full of compressed air by aid of my said apparatus, and which apparatus, at the same time that it is adapted to retain the said included air in a state of compression, in order to prevent or diminish the influx of water, or of semi-fluid earth, is also adapted to allow workmen to carry on their ordinary operations of excavating, sinking, and mining, by working under and within the space which is filled with compressed air, and also to allow workmen ready passage to and from the said space into those parts of the subterranean excavations or mines which contain air in a natural and ordinary state of elasticity. And other parts of my said apparatus facilitate the passage of materials to and from the open air into and out of those parts of the subterranean excavations or mines which are filled as aforesaid with, and retained full of condensed air by means of my apparatus," &c.

The specification in question then described the construction of the apparatus as applicable to sinking a shaft and making a tunnel under a river, and he described a shaft or tube of hollow iron cylinders closed at top, open at bottom, with air-pumps compressing air into it to prevent water from rising in it while the workmen worked in excavating. He also described the air, chambers, and valves, and partitions, by means of which workmen and materials were to have ingress and egress from the cylinder to the outer air.

On cross-examination, the plaintiff said that the object of Lord Dundonald's invention was different from his, but the mode of doing the thing was similar; that the only difference between Lord Dundonald's invention and what the defendants had done at Rochester Bridge was that Lord Dundonald worked on land and the defendants in water. Another engineer, a witness called by the plaintiff, gave similar evidence, and stated that the plaintiff's invention was not new for any other purpose except for making foundations under water, and that the only difference between Lord Dundonald's plan and the defendants' works was in the application and object, the one being, among other things, to make a roadway under a river, the other a foundation in water; and that there was nothing in Lord Dundonald's specification which showed that it was to be used only on dry land.

The Chief Baron directed the jury, that, if they believed the evi-

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dence, "the said invention was not any manner of new manufacture," and that they should find for the defendants on the third plea. The plaintiff's counsel excepted to the direction, "and contended that the same was erroneous and wrong."

February 2. *Cockburn*, Attorney-General, for the plaintiff. The Chief Baron was wrong in his direction to the jury, in telling them that the plaintiff's invention was not an invention of any manner of new manufacture. Lord Dundonald's invention was not the same as the plaintiff's. The cylinder or caisson of the plaintiff was different from Lord Dundonald's, the mode of using it different, and the result different. The object which Lord Dundonald had in view was to sink a shaft in a mine or in the earth, and to be able to force out the water horizontally, in case it should be met with during the operation. It was constructed with reference to the Thames Tunnel, and never was practically useful. The plaintiff uses his cylinder for the purpose of building foundations under water. The cylinder is sunk to the bottom, the air-pump forces the water out, the workmen excavate below and fill up each chamber in turn from the bottom with concrete, thus leaving, when they rise to the surface, a solid mass of concrete bound round with iron. This idea of building under water, and leaving the cylinder in as part of the foundation, never entered into Lord Dundonald's head. The edifice thus erected under water, is a new manufacture. Even assuming the two cylinders to be identical, *Crane v. Price*, 4 Man. & G. 580; *Newton v. Vaucher*, 6 Exch. Rep. 859; s. c. 11 Eng. Rep. 589; and *Newton v. The Grand Junction Railway Company*, 5 Ibid. 331; s. c. 6 Eng. Rep. 557, show that the application of an old process to a new subject-matter may be the subject of a patent. Whether it was a new manufacture was, at any rate, a question for the jury, not for the judge. *Steiner v. Heald*, 6 Ibid. 607; s. c. 6 Eng. Rep. 536.

Hindmarsh, for the defendants. It is not open to the plaintiff to take the objection that it was a question for a jury, whether it was a new manufacture. The point that it ought to have been left to the jury, was never taken below. The only exception is, that the judge was wrong in directing the jury that, if they believed the evidence, the invention was not an invention of any manner of new manufacture. The party excepting ought to have stated how the judge was wrong. The exception that the judge is wrong is not sufficient, unless there is only a single point of law in question.

[CRESSWELL, J. The issue raised involves two questions, whether the plaintiff's invention was new, and whether it was a manufacture. The Chief Baron seems to assume that the evidence negatives one or other of these two branches.]

Next, the plaintiff's patent is for improvements in the means and apparatus of building and laying foundations under water. In the specification, he describes the apparatus and the mode of using it, and he claims as his invention a particular mode of constructing a caisson for the purpose of making the foundation. If either portion of his

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claim is not new or not a manufacture, the Chief Baron was right, for an objection may be taken to a portion of an invention claimed, as well as to the whole; and unless the patentee can establish the novelty of the whole that he claims as his invention, he must fail altogether. *Holmes v. The London and Northwestern Railway Company*, 13 Com. B. Rep. 831; s. c. 16 Eng. Rep. 409. If any part be old, he ought to take care to disclaim that part. *Tetley v. Easton*, 2 E. & B. 956; s. c. 22 Eng. Rep. 321. Here the plaintiff's claim includes Lord Dundonald's invention, for the plaintiff claims the making the cylinders for the purpose of building under water. The evidence is all one way to show that the cylinders of the plaintiff and in Lord Dundonald's specification are identical in substance. In claiming the construction of the cylinders, the plaintiff, therefore, claims what is not new. There is nothing in Lord Dundonald's specification to exclude the supposition that it might be used under water. Further, if it be contended that the claim is not for the making of the cylinders, but only for their application to a new subject-matter, it is submitted that that is not the subject of a patent. *Crane v. Price*, which is relied on to show that a new use of an old thing can be a subject of a patent, has been very much doubted, and it has been recently explained and supported on a different ground, in *Dobbs v. Penn*, 3 Exch. Rep. 427; namely, that the process produced a new result, namely, a superior kind of iron. Nor do the cases cited and relied on, in *Crane v. Price*, support the proposition when examined, for *Hall v. Boot*, Webster's Patent Cases, 100, was not the case of a new use of an old process, but, in fact, the invention was a new process; it was an invention of a means of drawing flame through lace, the old process being that of only singeing the outside of the lace. In *Derosne v. Fairie*, Ibid. 154; s. c. 2 Cr. M. & R. 476, the patent was not supported, and the question as to the novelty of the manufacture was not raised. These, the only authorities which can be found at all in favor of the plaintiff's proposition, do not in reality support it. There are other cases which have a contrary aspect. *Kay v. Marshall*, 5 Bing. N. C. 492, and *Losh v. Hague*, Webster's Patent Cases, 200, illustrate the rule, that the application of an old machine to a subject to which it was not before known to be applicable, is no subject of a patent. A patent for a new anchor, composed of three flukes put together by a known process, was held bad. *Brunton v. Hawkes*, 4 B. & Ald. 541. *The King v. Cutler*, 1 Stark. 354, lays down the same principles, that the application of an old process in a new manner is no ground of a patent.

The Attorney-General, in reply. It was a question for the jury, whether the plaintiff's cylinder was the same as Lord Dundonald's.

[WILLIAMS, J. You might have addressed the jury on the point, had you thought fit.]

Assuming the cylinders to be the same, the application is a new invention. The plaintiff's claim is not the applying an old machine to a new subject, but a new mode of applying it. That makes it the ground of a patent, for the mode of a process may be a manufacture.

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Hindmarsh on Patents, 83; and *Russell v. Cowley*, 1 Cr. M. & R. 864. Whether the plaintiff claims the mode of making the foundations, or the foundations made in such a mode, does not matter.

COLERIDGE, J. The question arises in this case upon the direction of Pollock, C. B., who, upon the issue raised upon the third plea, told the jury that, if they believed the said several matters given in evidence, then the said invention was not an invention of any manner of new manufacture, and that they ought to find a verdict for the defendants. We are all of opinion that the Chief Baron was justified in giving that direction to the jury under the circumstances. Two or three points have been made on which the court does not think it necessary to pronounce an opinion; but we propose to confine ourselves to one clear point, on which the direction can be sustained. Whatever the plea puts in issue, at all events it puts in issue the novelty of the construction of the instrument itself to be used. It says: "The supposed invention was not an invention of any manner of new manufacture." What was the invention claimed? On reference to the specification, it appears that, at all events, the novelty of the construction of the interior of the caisson was claimed and is put in issue, and if that was put in issue and was not new, the plea is made out. Now, when we consider the evidence, it seems all one way. After putting in the specification and Lord Dundonald's patent, the plaintiff and his witness were called. They had before them the model of the one patent, and a description of the other. Both the plaintiff and the witness said, that the cylinder and caisson in the two specifications are the same in all material respects, the only difference being the place in which they were to be employed, the one on dry land, and the other in water. There being nothing to contradict this statement, the Chief Baron was justified in saying that the supposed invention was not new, a material part of it being old.

Judgment affirmed.

KIRBY v. SIMPSON.

June 26, 1854.

Action against Magistrates — Notice of Action — Acting Maliciously — Bona Fides.

A magistrate acting in the execution of his office is, by the 11 & 12 Vict. c. 44, entitled to notice of action, although he acts maliciously and without reasonable and probable cause.

In actions against magistrates for acts done in the execution of their office, the judge is to decide whether notice of action is necessary, and the jury are not to determine the question of *bona fides*.

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TRESPASS. The first count stated that the defendant gave the plaintiff into custody, and caused him to be imprisoned in the house of correction. The second count alleged, that the defendant, being the owner of a duck, which the plaintiff had unwittingly killed, and being desirous to punish the plaintiff for so killing the said duck, maliciously caused and instigated one John Blenkin to make a complaint, on oath, to him, the defendant, as one of her Majesty's justices of the peace for the East Riding of the county of York, that the plaintiff had, as his hired servant, in his, the said John Blenkin's, said service, been guilty of divers misdemeanors, miscarriages, and ill behavior towards him, the said John Blenkin; and the said defendant maliciously convicted him, the plaintiff, of the said offence, and wilfully, wrongfully, and without sufficient cause, issued his warrant of commitment, whereby he commanded the constable of Bridlington, in the said East Riding, to convey the said plaintiff to the said house of correction at Beverley, and also commanded the keeper of the said house of correction to receive the said plaintiff into his custody in the said house of correction, there to remain and be corrected and be held to hard labor for the space of twenty-one days from the date of the said commitment; and the defendant, for the furtherance of his said malicious desire, wrote a letter to the jailer of the said house of correction at Beverley, ordering him to flog the said plaintiff severely.

Plea, not guilty by statutes, the 11 & 12 Vict. c. 44, and 20 Geo. 2, c. 19, s. 2.

At the trial, before Cresswell, J., at the last Yorkshire Spring Assizes, the defendant gave evidence of the following facts. The plaintiff, a boy of thirteen years of age, and in the service of one Blenkin, passing the premises of the defendant in the month of June, 1853, killed one of the defendant's ducks. The plaintiff was shortly afterwards brought before the defendant, a magistrate of Yorkshire, and on being charged with killing the duck, stated that he thought it was a wild duck. The defendant then told the plaintiff he might go, but that he should be sent to Beverley the following week. A few days after, the defendant sent for the plaintiff and Blenkin, and on their coming to his house said: "So this is the boy that killed the duck;" to which Blenkin answered: "Yes, and I have told him to be sure not to do so." Upon this, the defendant said he should send the boy to Beverley jail, and proceeded to make out a commitment. This commitment, which was also a conviction, stated that information had been made, on the oath of John Blenkin, before the defendant, one of her Majesty's justices, &c., that John Kirby, one of his hired servants, had, in his service, been guilty of divers misdemeanors, miscarriages, and ill behavior towards him, and particularly by neglect and disobedience of orders on the 2d of June, as well as on other similar occasions. The commitment then stated that he was convicted thereof, and commanded the jailer to receive him in the house of correction, there to remain and be corrected and held to hard labor for twenty-one days. The plaintiff having been lodged in the house of correction accordingly, the jailer wrote to the defendant, stating that an

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old form of commitment had been used, but he supposed the defendant did not mean the boy to be flogged. To this the defendant answered, that he wished the plaintiff to be flogged, the plaintiff's father having given a bad account of him. The plaintiff was flogged accordingly. The plaintiff's case having closed, it was contended, on behalf of the defendant, that he was entitled to notice of action, pursuant to the 11 & 12 Vict. c. 44, s. 9. For the plaintiff, it was urged that the evidence showed that the defendant had acted maliciously, and had used his power as justice of the peace, colorably, and for the purpose of oppression; and that the question of the defendant being entitled to notice of action depended upon his *bona fides*, which point was for the jury. The learned judge ruled that the defendant was entitled to notice of action, and that there was no question for the jury, and accordingly he directed a nonsuit.

A rule *nisi* having been obtained by

Price, on the ground that no notice of trial was necessary,

Thompson showed cause. The defendant, being a magistrate, was entitled to notice of action for any act done by him in the execution of his duty, whether done maliciously or not. The 8th section enacts, "that no action shall be brought against any justice of the peace for any thing done by him in the execution of his office" after six months; and the 9th section enacts, that "no such action shall be brought against any justice of the peace until one month's notice of action has been given." Every magistrate, therefore, who acts in the execution of his office is entitled to notice of action, whether he acts maliciously or not. He is entitled to such notice in order that he may be able to tender amends; and it is reasonable that he should be allowed to tender amends, even although he may have acted maliciously. The very fact of a magistrate being allowed to tender amends implies that he has acted wrongfully, and he is not the less entitled to notice of action because he has not only acted wrongfully, but maliciously also. No case can be found in the books as to the question of *bona fides*, with reference to magistrates being entitled to notice of action.

[PARKE, B. The acts of parliament relating to notice of action to be given to magistrates, differ from those in which notice of action is to be given to private individuals.]

The sole question in this case is, whether the defendant was a magistrate acting "in the execution of his office;" and as it was clear that he was so, he was entitled to notice of action, whether he acted maliciously or not. *Wedge v. Berkeley*, 6 Ad. & E. 663, may be relied on by the other side. That, it is true, was the case of an action against a magistrate, and the court said that *bona fides* was a question for the jury; but there the character in which the defendant acted was equivocal. He cited and mentioned *Staight v. Gee*, 2 Stark. Rep. 445; *Cook v. Leonard*, 6 B. & C. 351; *Beechey v. Sides*, 9 Ibid. 806; *Cann v. Clipperton*, 10 Ad. & E. 582; *Kine v. Evershed*, 10 Q. B. Rep. 143; *Briggs v. Evelyn*, 2 H. Black. 114;

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Horn v. Thornborough, 3 Exch. Rep. 846; *Weller v. Toke*, 9 East, 364; *Morgan v. Palmer*, 2 B. & C. 729; *James v. Saunders*, 10 Bing. 428; and *Wright v. Wales*, 5 Ibid. 336. Secondly, the question of *bona fides* is not for the jury, but for the judge. The observations in *Wedge v. Berkeley* were not well founded, and were not necessary to the decision of that case. *Arnold v. Hamel*, 9 Exch. Rep. 404; s. c. 24 Eng. Rep. 547, is in point, and shows that the question of *bona fides* is for the judge, and not for the jury. There, the 8 & 9 Vict. c. 87, the Smuggling Prevention Act, enacted, section 117, that "no writ shall be sued out against, nor a copy of any process served upon, any person acting under the direction of the commissioners of customs, for any thing done in the execution of or by reason of his office, until one calendar month next after notice in writing." Section 118: "Provided always, that no plaintiff in any case when an action shall be grounded on any such act done by the defendant shall be permitted to produce any evidence of the cause of such action, except such as shall be contained in the notice to be given as aforesaid." It was held, that, under these enactments, it was the province of the judge to decide whether notice of action was necessary, and for that purpose he should have evidence on both sides, so as to enable him to determine whether the defendant was an officer of the customs, acting by reason of his office, and under a reasonable belief that his duty as such officer required him to act as he did. The words of that act and of the present are the same in effect. The 12th section makes it incumbent on the plaintiff to prove that the action was brought within the time limited by the act, &c. *Wagstaffe v. Sharpe*, 3 Mee. & W. 521, applies to this part of the case. He also referred to *Shearwood v. Hay*, 5 Ad. & E. 383, and *Brittain v. Kinnaird*, 1 B. & B. 432.

Price, contra, in support of the rule. First, the 11 & 12 Vict. c. 44, has no application to this case. It appears on the face of the declaration that the action is brought against the defendant, not for convicting the plaintiff improperly, but for taking advantage of his position as a magistrate to injure him. The defendant maliciously instigated the master to bring a charge against the plaintiff. The defendant, therefore, was not acting in his character of magistrate, but stood, in fact, in the situation of an ordinary individual. *Barton v. Bricknell*, 20 Law J. Rep. (N. S.) M. C. 1, s. c. 1 Eng. Rep. 298, is in point. Secondly, supposing the 11 & 12 Vict. c. 44, applies, then, under the 9th section, it was the duty of the judge to put to the jury the question, whether the defendant had acted *bona fide*. *Wedge v. Berkeley* is decisive as to that point.

[PARKE, B. The second count shows that the defendant was acting as a magistrate; it alleges that he acted improperly as such, but does not state that he acted maliciously and without reasonable and probable cause. A magistrate may act maliciously, and yet may have reasonable and probable cause for his acts. So he may be in the execution of his duty, although he may act maliciously; and I think, therefore, he was entitled to notice of action. If he were act-

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ing within his jurisdiction, in what way can he be said not to be acting as a magistrate? The plaintiff's case is, that he abused his power as a magistrate.]

The tendency of the decisions is to show that the question of *bona fides* is for the jury, and that upon that question depends the point whether the defendant is entitled to notice of action.

PARKE, B. I think this rule must be discharged, as the plaintiff was properly nonsuited. In support of the first count, the plaintiff put in evidence the commitment, which, according to the authority of the cases, amounted to a conviction. Now, upon that first count, the plaintiff was clearly out of court, as he himself showed a commitment which, being good upon the face of it, afforded a protection to the magistrate. The second count, also, admits that the defendant was acting as a magistrate, as it states that the defendant instigated Blenkin to make a complaint to him, the defendant, as one of her Majesty's justices of the peace for Yorkshire, and that the defendant issued his warrant of commitment against the plaintiff. That shows that the defendant was acting as a magistrate. On that state of facts, the defendant was entitled to notice of action. Then comes the question, whether the matter is for the court or the jury, and I must say that, before to-day, I have always thought that if a question of *bona fides* arose, it was a matter to be determined by the jury. In *Hazeldine v. Grove*, 3 Q. B. Rep. 997, the Queen's Bench said, that the plaintiff not having demanded that the question of *bona fides* should be put to the jury, could not demand a new trial on the ground that the judge had nonsuited him on the objection. But, in cases relating to magistrates, I doubt much whether it be law that the question of *bona fides* is a matter to be determined by the jury. In the case of *Arnold v. Hamel*, this court was of opinion that the points there raised were for the judge and not for the jury, since no effect could be given to the act of parliament, unless the facts there raised were decided by the judge. I, for one, certainly did not think at the time that the 24 Geo. 2, c. 44, bore a resemblance to the Customs Act, by which that case was governed. But if the present case had stood on the statute of 24 Geo. 2, c. 44, I should have been of opinion that the same law was applicable as in *Arnold v. Hamel*. The wording, however, is different. But, nevertheless, I think the judge, in this case, was bound to decide whether notice of action was requisite or not. I must say, I cannot distinguish between the 12th section of this act of parliament, 11 & 12 Vict. c. 44, and the act of parliament by which *Arnold v. Hamel* was decided. I hold the opinion that I entertained on the moving of the rule *nisi*, that the protection, granted by the 1st section of the 11 & 12 Vict. c. 44, applies to all that is done by a magistrate in the execution of his duty. That section, in effect, admits that a magistrate may act maliciously, and yet may be in the execution of his duty within the act of parliament, and be entitled to notice of action. The result of the 9th and 1st sections is, that, even in cases where the magistrate in the execution of his office has acted maliciously, he is entitled to notice of action. The ques-

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tion, therefore, was one for the determination of the judge, and the learned judge, in this case, was right in taking upon himself the determination of this case. With respect to the facts of the case, I am of opinion that there was no want of reasonable and probable cause. The question of reasonable and probable cause was a matter for the consideration of the judge. Here, the action was brought against the defendant solely, in his character of magistrate, and notice of action was required to enable him to tender amends to the plaintiff, which he was at liberty to do under the act of parliament. I may add, that these observations will not necessarily apply to all the cases arising under various acts of parliament, but only to cases relating to magistrates.

PLATT, B. I am of the same opinion. This question depends on the 11 & 12 Vict. c. 44, illustrated and explained by the cases decided on other acts of parliament, and by the 24 Geo. 2, c. 44. I must say I do not quite understand the arrangement and nature of the 11 & 12 Vict. c. 44; for the 1st section, which applies to cases of a magistrate acting within his jurisdiction, does not state that no action shall be brought until the conviction or order has been quashed, whereas the 2d section enacts, that when a magistrate has acted without jurisdiction, or has exceeded his jurisdiction, no action shall be brought until after the conviction has been quashed. It is difficult, I say, to understand the meaning of this diversity in the clauses, but we must find our way to the true construction of the clauses as well as we are able. Now, the 9th section says, "that no such action shall be commenced against any justice," until after notice of action. That refers to the 8th section, which refers to any thing done by the justice, "in the execution of his office." Now, the 8th section includes the 1st; for the words, "in the execution of his duty," and, "in the execution of his office," are identical in their meaning. This case falls within the 1st section, and it ought to have been stated in the declaration that the act was done "maliciously and without reasonable and probable cause." The declaration may, however, in that respect, be amended. Therefore, supposing the declaration to contain this allegation, still, the 9th section as to notice of action applies. Where, therefore, a magistrate acts in the execution of his office maliciously, and without reasonable and probable cause, still, he is entitled to notice of action. Reading, therefore, the 1st, 8th, and 9th sections together, I am of opinion that the judge was right in taking upon himself to decide that notice of action was necessary; and, therefore, this rule must be discharged.

MARTIN, B. I am of the same opinion. The question against the defendant is, what is the cause of action? I think it falls within the 1st section of the statute,—assuming, as I do, that the declaration is amended. The real complaint is, that the defendant induced the master of the plaintiff to come before him, and, without examining the plaintiff upon oath, convicted him of a breach of duty. If, indeed, the plaintiff had been fairly charged before him, and the master of

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the plaintiff had shown that there was good cause of action against him, and the defendant had confined himself to do an act which was within his jurisdiction, and he had authority, he could not be liable, as we cannot look at the motives of the defendant. The real cause of action is, that the defendant convicted the plaintiff maliciously, and without reasonable and probable cause. The case, therefore, falls within the 8th and 9th sections of the 11 & 12 Vict. c. 44; and, therefore, the judge who tried the cause was right in deciding that the defendant was entitled to notice of action.

Rule discharged.

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May 29, 1854.

Bond—Condition—Principal and Surety.

The condition of a bond executed by the defendant as surety for A, recited (*inter alia*) that it had been agreed between the directors of a company and A, that A should proceed to such place in the East Indies, at such time and by such conveyance as the directors should direct, and there serve the company as engineer, at a certain monthly salary, to commence from the day of his embarkation at Southampton. The defeasance provided (*inter alia*) that if A should forthwith proceed to such place in the East Indies, at such time and by such conveyance as the directors should direct, the bond should be void. A was paid part of his salary in advance in London by a clerk of the company, who, at the same time, gave him a ticket for the steamer from Marseilles, and money for the journey to that place, but he remained at Boulogne for some time, and then returned to London:—

Held, in an action against the defendant on the bond, that the embarkation of A at Southampton was not a condition to the operation of the bond; and that there was evidence of A having been directed by the directors to proceed to the East Indies by Marseilles, and that by his neglect the bond was forfeited.

THE declaration was on a bond for 400*l*.

The second plea set out the bond and condition at length.¹ The condition recited that by an agreement, bearing date the 20th of October, 1853, made between the directors of the Bombay, Baroda, and Central India Railway Company on the one part, and Plant on the other part, it had been agreed (*inter alia*) that the said Plant should forthwith proceed to such place or places in the East Indies, at such time and by such conveyance as the said company should direct, and should there serve the company as engineer and surveyor, at a salary of 41*l*. 13*s*. 4*d*. per month, to commence from the day of his embarkation at Southampton, and to be payable monthly, and the said Plant should provide his own outfit in his said business of engineer and surveyor. It also stated that the company had advanced to Plant 125*l*., on account of salary under the agreement, and had paid his

¹ The condition was fully set out in the plea, but it is here stated according to its terms, so far as they were material.

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passage-money to India; and that the defendant had agreed to become security or guarantee for the said Plant, for fidelity and trust, and to join with him in the said bond; and it was declared that the condition of the said bond was that, if the said Plant should then forthwith proceed to such place or places in the East Indies, at such time and by such conveyance as the said company should direct, and should from time to time and at all times well and faithfully serve the said company, &c., then the said bond or writing obligatory should be void and of no effect, otherwise to remain in full force and virtue. The plea then proceeded to aver performance of the several parts of the condition.

Replication — That the said Plant was, by the condition of the said writing obligatory, directed by the said company to proceed forthwith at a time and by a conveyance directed by the said company, to a place in the East Indies, to wit, Bombay, of all which the said Plant had notice, and could and might have obeyed and complied with, and that a reasonable time had elapsed, and he did not so proceed, but also, before the commencement of this suit, abandoned the said service of the said company, whereby 125*l.* advanced to the said Plant, and also 5*l.* passage-money, &c., have been and are actually lost to the said company. Issue thereon.

At the trial, before Pollock, C. B., at the London Sittings after Hilary term, it appeared at the time of the bond being entered into, the usual steamer from Southampton had left, and that another would not sail for a fortnight. A clerk of the company then delivered a letter of instructions to Plant, and also gave him 125*l.* as three months' salary in advance, and 5*l.* for his expenses to Marseilles, where he was to take the steamer and proceed to India. He was, at the same time, supplied with tickets for that purpose. Plant set out accordingly, but did not go further than Boulogne, and after some little time returned to London. The letter of instructions was not produced, and no evidence of its contents given. It was objected, on behalf of the defendant, first, that no directions were proved to have been given to Plant, in pursuance of the terms of the condition; secondly, that if there were any directions, the defendant was not liable under the bond, unless Plant was directed to sail from Southampton; and, thirdly, that the 125*l.* and 5*l.* were not secured by the bond. His lordship overruled the objections, and a verdict was found for the plaintiffs for 130*l.*, with leave to the defendant to move to enter a nonsuit, or reduce the damages to a nominal sum.

A rule *nisi* was subsequently obtained accordingly, against which

Hawkins and *Henniker* now showed cause. There was abundant evidence to go to the jury, that Plant was directed by the company to go to Marseilles, for although the written instructions were not produced, the clerk gave him not only the three months' salary in advance, but furnished him with the means of going to India *via* Marseilles. That these were directions to proceed to India, was clearly understood by Plant himself, as his conduct showed. Then, as to his non-embarkation from Southampton. It could not be contended that this accident

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was to render the whole bond nugatory. Suppose he had missed the steamer, and joined at Plymouth, would that have had the same effect? The fact is, that the bond was forfeited, because the directions to proceed forthwith to India were not obeyed. The embarkation at Southampton was not a condition precedent at all. It was mentioned as an indication of the time from which the salary was to be payable, by reference to the known periods of the steamers leaving Southampton. The bond being forfeited, the plaintiffs are entitled to these damages.

Collier, in support of the rule. This being a contract by a surety, is to be construed strictly in his favor, and the contract was, that Plant should embark at Southampton. The surety might well say: "I will be surety if he goes by sea, but I will not run the risk of his being exposed to the temptations of Paris." Then, as to the evidence of the directions, the real instructions were doubtless contained in the letter, which ought to have been produced.

ALDERSON, B. The condition of the bond was, that Plant should forthwith proceed to such place or places in the East Indies, at such time and by such conveyance as the company should direct. It may be a matter of conjecture that the defendant contemplated his going from Southampton, but the condition of the bond in no way makes it necessary; the parties to the bond undertook that he should proceed as directed. Then, was there evidence to go to the jury that he was directed to go through France by Marseilles? The clerk of the company delivers tickets for the steam-packet, and also pays Plant his passage-money to proceed to Marseilles. Surely, that was evidence which might most reasonably have convinced the jury that directions had been given, at the same time, that he should go to India *via* Marseilles. Plant did not, however, go to Marseilles, but stopped at Boulogne, and spent his money. That, then, was a forfeiture of the bond, and the defendant was liable. I therefore think this rule ought to be discharged.

PLATT, B. I am of the same opinion. The tickets were given to Plant, and the money accompanying them corresponded with the sums mentioned in the agreement, and he might infer, therefore, that he was directed to go to Marseilles. There was evidence, therefore, to go to the jury of his having received directions, and it is equally clear that he never completely followed those directions. As to the sailing from Southampton, all that the condition in the bond says is, that the salary was to commence from the time of his embarkation at Southampton. That was merely a mode of fixing the amount of salary. Here between the present parties no question could arise on that point, for the defendant bound himself that Plant should go to India when and in what manner the company should direct.

MARTIN, B. I also think that the plaintiffs are entitled to recover on this bond. The place of embarkation had nothing to do with the

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liability of the surety. The agreement was to go where and how the company should direct, and it would have been quite competent for the company and Plant to agree to go by any other route than Southampton. There was enough of evidence to go to the jury as to the directions given by the company.

POLLOCK, C. B. Whatever may be the conjecture as to the intention of the parties, the bond does not make the embarkation at Southampton an essential condition to its operation.

Rule discharged.

HOOKPAYTON v. BUSSELL.

May 31, 1854.

Action, when maintainable — Judge's Order — Undertaking to pay,

An action does not lie for disobedience to a judge's order, whether drawn up by consent or hostilely.

A defendant having been arrested in respect of a debt from which he was protected by an order of the insolvent court, applied for his discharge to a judge at chambers, when the following order was made: "Upon hearing the attorneys or agents on both sides, I do order that upon payment by the defendant of 5*l.* forthwith the defendant be discharged, the defendant hereby undertaking to pay the rest of the debt and costs," by certain specified instalments: —

Held, that a declaration for breach of this undertaking was bad, although it also stated that the order was made with the consent of the plaintiff and the defendant.

• THE declaration stated, that the plaintiff had recovered judgment against the defendant; that afterwards the defendant filed his petition in the Insolvent Court for protection; that the plaintiff opposed his application, and incurred costs in such opposition, and that the application was adjourned; that the plaintiff then issued a *ca. sa.* on the judgment under which the defendant was arrested, and that whilst in custody, the defendant caused a summons to be served upon the plaintiff to show cause why, amongst other things, he should not be discharged, which summons was afterwards, on the 27th of April, 1853, attended by the plaintiff and the defendant, before Platt, B.; that, in consideration that the plaintiff would not oppose and would consent to the said Platt, B. making the order hereinafter mentioned; thereupon, on the same day and year last aforesaid, the said Platt, B., by and with the consent of the said plaintiff and the defendant, made an order in the words and figures following, (that is to say,) "W. H. Hookpayton v. E. R. Bussell. Upon hearing the attorneys or agents on both sides, I do order that, upon payment by the defendant of 5*l.* to the plaintiff's attorney forthwith, the defendant be discharged out of the custody of the sheriff of Middlesex, as to this action, the defendant hereby undertaking to pay the rest of the debt and costs,

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including the costs of the opposition (4*l.* 4*s.*) in the Insolvent Court, by monthly instalments of 2*l.* The first payment to be made on the 27th of May, next; the judgment to stand as a security. The defendant hereby consenting that, in default of payment of either of the said instalments as aforesaid, the plaintiff be at liberty to issue execution by *fiery facias*, or *capias ad satisfaciendum*; the defendant hereby undertaking to bring no action against the plaintiff." And the plaintiff further says, that the defendant thereupon, then and forthwith paid to the plaintiff's attorney, in pursuance of the said order, the sum of 5*l.*, and with the consent of the plaintiff, was discharged out of the custody of the said sheriff as to the said action, and although the defendant afterwards, in pursuance of his said undertaking, did pay to the plaintiff the first of the said instalments of 2*l.*, yet he has not paid any other of the said instalments, and the whole of the residue thereof, and of the residue of the said sums of 147*l.* and 4*l.* 4*s.* are still wholly due and unpaid.

Plea — that the defendant duly filed his petition in the Insolvent Court, and that he annexed thereto a schedule of his debts, in which the plaintiff was duly described as a creditor in respect of the several debts in the declaration, and duly obtained his final order for protection, and that the debts in the declaration mentioned, were contracted before he filed his petition.

Replication — that the petition mentioned in the plea, was the same as that in the declaration, and that the defendant consented to the order set out in the declaration after the filing of the petition.

Demurrer and joinder.

Maude, in support of the demurrer. The action is really brought upon the judge's order, but it has been very recently decided, that an action will not lie for non-compliance with a judge's order. *Dent v. Bashman*, 9 Exch. Rep. 469; s. c. 25 Eng. Rep. 463. There was no contract between the parties so as to make the judge's order merely the mode of expressing that contract. The order is only a direction by the judge what shall be done, and it acquires its force from him, and not from what the parties did previously to the order being obtained. Thus, a nonsuit indorsed on a summons, binds neither party, unless the order be drawn up and served pursuant thereto. *Joddrell v. ———*, 4 Taunt. 253. This order does not even express that it was made by consent.

[PLATT, B. If an order is not drawn up, it is treated as abandoned.]

Dowdeswell, contra. If a man undertakes for a good consideration, to do any particular act, an action will lie upon the undertaking.

[PLATT, B. Did you ever hear of an action upon a peremptory undertaking?]

POLLOCK, C. B. The undertaking is to the judge or court, and not to the party.]

Wade v. Simeon, 1 Com. B. Rep. 610, was an instance of an action being brought upon the agreement in pursuance of which a judge's order had been made.

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[MARTIN, B. I happen to know that that declaration was considered bad; and if there had been a verdict for the plaintiff, there would have been a motion in arrest of judgment.]

What was said by Parke, J. in *Wentworth v. Bullen*, 9 B. & C. 840, is an express authority for this action: "Though there is no remedy," said that learned judge, "for disobedience of a judge's order, as such, by one of the parties against another by action, but by attachment merely, yet, if it be made by consent of both, and is founded on a binding agreement, an action will not the less lie upon that agreement, though it have also the additional sanction of a judge's order. The contract of the parties is not the less a contract, and subject to the incidents of a contract, because there is superadded the command of the judge. The case of an agreement to refer by order of a judge is a familiar instance; many actions being brought upon such agreements."

[MARTIN, B. You declare on the order and not on the consent. If you like to amend and state the agreement, and endeavor to prove it at the trial by the order, you may; but you have not much chance of success.]

[POLLOCK, C. B. What has been cited from *Wentworth v. Bullen*, was purely an *obiter dictum*.]

The particular mode of payment, was agreed on by the parties, and the defendant obtained the benefit, for he was discharged from arrest.

[ALDERSON, B. Where is the promise by the defendant to obey the order?]

The terms are "hereby undertaking."

POLLOCK, C. B. I am of opinion that the defendant is entitled to judgment. This is an attempt to bring an action upon a judge's order, for the order is not even by consent. Even if it were by consent, the action would not lie, for the consent is only that the order be drawn up in the particular form, the judge having general jurisdiction over the matter. When drawn up, it embodies the agreement, and is to be dealt with as any other order.

ALDERSON, B. I agree that for this purpose it makes no difference whether the order was by consent or not. In either case, the action will not lie.

PLATT, B., and MARTIN, B., concurred.

*Judgment for the defendant.*¹

¹ The effect of an order appearing to be drawn up "by consent" is, that the court will not entertain an application to rescind it. *Hall v. West*, 1 Dowl. & L. P. C. 412.

Winship v. Hudspeth.

WINSHIP v. HUDSPETH.

June 2, 1854.

Right of Way — User as of Right — Unity of Possession.

A plea under the statute 2 & 3 Will. 4, c. 71, of a user of a way as of right for twenty years over a close, is not supported by proof of a user of the way for part of the twenty years while M. was the landlord and owner as well of the messuage in respect of which the right was claimed as of the close over which it was exercised, and for the rest of the period when the defendant had acquired the freehold of the messuage.

TRESPASS for breaking and entering the plaintiff's messuage and yard, and throwing down his wall.

Pleas: First, not guilty; secondly, that the defendant was possessed of a messuage, the occupiers of which, for twenty years before the action, enjoyed, as of right and without interruption, a footway to and from a public highway, from and to the defendant's messuage, over the yard of the plaintiff, and then justifying the trespass in respect of that way.

At the trial, before Platt, B., at Durham Spring Assizes, it appeared that the plaintiff and the defendant were the respective owners of adjoining cottages. The lands on which they stood were sold, in 1823, by one Pemberton to Joseph Manners, who built the houses, leaving open yards at their rear, adjoining a public road over a common. The defendant was Manners's son-in-law, and occupied one of the houses, from 1829 to 1839, without paying rent, and during that occupation he used to pass over the ground in question, lying in the rear of the adjoining house, which was occupied by Manners's tenants. Manners died in 1838, and his trustees, in 1839, sold the one house, with the land behind it, to the defendant, and the other to the plaintiff. The defendant continued to pass over the ground in the rear of his neighbor's house until 1852, when the plaintiff erected the wall in question, dividing his yard from that of the defendant. Under the direction of the learned judge, the jury found a verdict for the plaintiff, damages 40s., leave being given to the defendant to move to enter a verdict for him if the court should be of opinion that there was any evidence to go to the jury of a right to the way set up by the second plea.

A rule *nisi* having been granted.

Knowles and *Unthank* appeared to show cause; but the court called upon

Manisty, in support of the rule. The question is, whether there was a user of the way for a sufficient length of time, or in other words, whether the user before the purchase can be coupled with that since: unity of seisin must not be confounded with unity of possession. If the state of things existing during Manners's life, had con-

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tinued for a period of twenty-one years, the tenant would have acquired a right not only to the way, but to the house, for the adverse occupation by a tenant at will commences at the end of the first year, when such tenancy is deemed to have expired. That being so, it would be an anomaly if the right to the house would be completed, yet that the right to a way attached to the house would be acquired. Then, how does the fact, that the defendant purchased the house during the twenty years, affect his right? Suppose, instead of the defendant, a third person had bought from Manners, and that person had allowed the defendant to occupy, would not there have been a user as of right? It is important to bear in mind the distinction between unity of seisin and unity of possession. In *England v. Wall*, 10 Mee. & W. 699, to the same plea as that pleaded here, the plaintiff replied, that before the period of twenty years mentioned in the plea, one W. C. was seised in fee, as well of the *locus in quo* as of the close in respect of which the defendant prescribed, and continued so seised during part of the said period of twenty years, to wit, until, &c., when he died so seised; and it was held that the plea was bad, for that unity of seisin was not inconsistent with the right as alleged in the plea, and unity of possession (if that were meant by the replication) might have been given in evidence under a traverse of the right as alleged in the plea. If I occupy a house for more than twenty years, and have continuously as of right used a way for twenty years, I should have acquired the right, notwithstanding a unity of ownership during a part of the period. *Bright v. Walker*, 1 Cr. M. & R. 211, may, at first sight, appear to be at variance with this doctrine, but that was the case of a term for life, respecting which there is a special provision in the 2 & 3 Will. 4, c. 71, s. 8. The judgment of the court, in that case, depended upon the fact that it was a lease for lives granted by a corporation sole, having power to dispute, within three years after the determination of the term, any right exercised during the estate for life. That case is really in favor of the defendant.

[ALDERSON, B. You have to make out a right to the way by a user for twenty years last past, on every occasion as of right. Could there be any evidence of a user of a right, when within twenty years the occupation was not of right?]

Yes: the question is, whether the user, during ten years of occupation in one character, can be joined to the user during the occupation for eleven years in another character? It is submitted it can; the only question being, whether there was a user as of right against all persons during the whole period, and there was evidence of such user as of right, it having been done openly. If the occupation continued, and the user was of right, it was immaterial what the character of the tenure was, or whether the title to the house was varied during the period—every thing depending on the continuous user; and these facts constituted evidence to go to the jury.

Knowles was not called upon.

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ALDERSON, B. This rule must be discharged. The true construction of the words "as of right" is, that the user must be as of right against all the world; but here, for the first ten years, there was no such exercise of the right, as has been determined by the case of *Bright v. Walker*. That case decided that a user could not give a title against all persons, if it did not give it against the lessor, and here the landlord could not have stopped the exercise of the right previously to 1839, and, therefore, those years must be struck out, for you cannot add the user not of right to the subsequent user as of right.

PLATT, B. I am of the same opinion. The right given by the statute by user, is the same right as if confirmed by express grant. Therefore, the user must be as of right against the same person who would have had a right to grant it. The tenant of the adjoining house could not make the grant, and, therefore, the user against him was immaterial.

MARTIN, B. Before the statute 2 & 3 Will. 4, c. 71, the courts supposed, from the evidence of user, the existence of imaginary grants; but there was no rule to guide the judges or jury as to when such grants ought to be presumed. That statute was framed to meet the difficulty, by enacting that no claim which may be lawfully made at the common law by custom, prescription, or grant to any way to be enjoyed over any land, when such way shall have been actually enjoyed by any person claiming right thereto, without interruption, for the full period of twenty years, shall be defeated or destroyed by showing only that such way was first enjoyed at any time prior to such period of twenty years; but, nevertheless, such claim may be defeated in any other way by which the same is now liable to be defeated. This is the provision relied on, and this claim is not defeated by showing that it was first used more than twenty years before, but may be defeated by showing that there was no right within the twenty years. Here the right of way is not sought to be defeated by showing a first user more than twenty years ago, but by showing a state of things within twenty years wholly inconsistent with a user as of right.

Rule discharged.

In re Sanville v. The Commissioners of Inland Revenue.

secured, an *ad valorem* duty is payable. A policy of assignment does not differ from any other sort of property.

[ALDERSON, B. This is only a contingent interest: it resembles a share in the profits of a bank. The party has settled all that his representatives may be entitled to after his death. How is that a definite sum?]

There is a wide distinction between shares and a definite sum of money. In the one case payment is to be made according to the value of shares, and in the other, according to the amount. *Caldwell v. Dawson*, 5 Exch. Rep. 1, shows that an assignment of a policy of assurance as security for a debt, with a proviso for redemption on payment, is a mortgage within the 55 Geo. 3, c. 184, schedule, part 1, and therefore requires an *ad valorem* stamp. The legislature intended to render every description of settlement liable to an *ad valorem* duty.

Cur. adv. vult.

The judgment of the court¹ was now pronounced by

POLLOCK, C. B. His lordship, after stating the facts as above set forth, proceeded. This case was argued, by Mr. Pigott, on behalf of the crown, chiefly on the ground of its having been the intention of the legislature to make liable every description of settlement. Mr. Pigott's argument was, if a sum of money be named as a matter to be settled, whether land, or charged or chargeable on land, or not, or if any shares in the public funds, or other corporation or companies, may be settled, in the case of the shares, the value is liable to the *ad valorem* duty; in the case of a sum, the gross sum is liable, whether receivable now or receivable hereafter, whether receivable absolutely or for life, or any other part or in any other manner whatsoever; and Mr. Pigott's argument was that this provision in the act of parliament included and comprised every possible mode of settling any sum of money. On the other hand, it was argued that the sum in question was not a sum of money at all, nor did it profess to be a settlement of a sum of money. It professed to be the assignment and transfer of a policy of insurance, which was no doubt for 4,000*l.*, and also for further sums that might become due and payable under it; but it did not profess to be a settlement of the money, but a transfer of a contract of insurance, so that the trustees under the marriage settlement might, for the purposes of the settlement, have the benefit of that contract. We are of opinion that the Commissioners of Inland Revenue were not justified in imposing the *ad valorem* duty which they put upon the deed, but that this description of transfer of a policy of insurance does not bear any *ad valorem* duty at all. It is, no doubt, liable to the stamp duty, but it is not liable to any *ad valorem* duty. It may be, though I think upon that subject a very considerable difference of opinion might well exist, — it may be that it

¹ POLLOCK, C. B., ALDERSON, B., PLATT, B., and MARTIN, B.

was the intention of the legislature to impose this duty. I believe all of my learned brothers are of opinion distinctly it was not. I am not quite so clear as I believe all my learned brothers are clear that it was not in the contemplation of the legislature. It may be that the view that was presented by Mr. Pigott may be so far correct that the individual who framed this item in the schedule may have thought when he mentioned the sum of money and shares in any company that he had included every possible subject-matter in a settlement; but whether that be so or not, I must say I entirely agree with the rest of the court that this is not within the plain language, spirit, and meaning, as that meaning is to be collected from the mere words that have been used.

If the language had been plain and explicit, if, for instance, the provision had been distinctly that any policy of insurance conveyed to trustees under any settlement for any purpose whatever, in possession, reversion, absolutely, or in any other manner whatsoever, should be subject to this *ad valorem* duty, no doubt, however unequal apparently the duty might have been, we should have had no choice in the matter. We must have pronounced that the commissioners were right in putting a stamp on the deed. But if we are to look at the meaning as explained by what is probable with reference to the equality or justice of the duty imposed, it certainly does appear, as in the course of the argument my learned brother Martin expressed, singular that there should be an *ad valorem* duty upon a transfer of a policy of which possibly only one premium may have been paid, and which, therefore, in point of value would not be worth one half, perhaps, of the small premium which might be paid upon the insurance. Now, it is certainly very true that that policy which covenants with the defendant by some solvent and responsible person to pay the premium would be worth much more than the premium without such a covenant. But the act of parliament which creates this duty does not certainly in this clause — I am not aware that it does in any other — impose an *ad valorem* stamp upon a grant upon a covenant to pay a sum of money in that way. If there had been such a provision, it might have been contended that the policy of insurance with that covenant to pay the premium would be worth the money. But one of the difficulties that Mr. Pigott would have to contend with would be this, that apparently if this policy were transferred, it would make no difference whether the settlor was under a covenant to pay the premiums, or whether the premiums were to be paid by the trustees from some other source. If, merely because a policy of insurance for a certain sum is transferred, that is to be considered as a settlement of a definite sum of money, then it would make no difference who is to pay the premiums. And then there would be an *ad valorem* duty charged on the matter which most clearly, in some instances, would not be worth a hundredth part of the value on which the duty is charged. We are, therefore, all of opinion that this duty cannot be charged. In the course of delivering the judgment of the court, I have mentioned certain reasons for

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which I am alone responsible, but we are all unanimously of opinion in accordance with the judgment which I have already pronounced.

● *Judgment for the appellant.*

COUNTY COURT APPEAL.

NORTHWESTERN RAILWAY COMPANY v. WHINRAY.

June 7, 1854.

Principal and Surety — Bond — Change of Salary — Release of Surety.

A bond was entered into in January, 1851, by the defendant and others severally to the Northwestern Railway Company. The condition recited that the company had agreed to appoint L. as their coal agent, for the purpose of selling coal for them, at a salary of 100*l.* per annum, on his finding sureties for his duly accounting and his honest conduct during the time of his continuance in such coal agency; and then stated that if L. should from time to time, and at all times, duly account and pay over the moneys received, the obligation should be void: Provided, that each of the sureties should be liable only for 50*l.* and should be at liberty to put an end to his liability on the bond, on giving the railway company six months' notice in writing. On the execution of the bond, L. entered upon his duties as coal agent and continued therein at the fixed salary until May, 1851, when it was agreed between L. and the company that instead of the fixed salary of 100*l.* a year, L. should have a commission of 6*d.* per ton on all the coal for which he should get orders. L. after this performed the same duties as before until the autumn of 1852, receiving or being allowed the commission, which was calculated to be, and in fact was, larger in amount than the fixed salary. The defendant never gave any notice to determine his liability. L. afterwards became indebted to the company for sums which he did not pay over. On an action against the defendant, as surety, it was

Held, that the agreement between him and the company was that he would be liable as surety, so long as L. continued coal agent at the specified fixed salary, and therefore, that the change in the mode of remuneration relieved him from responsibility.

THE following case was stated on appeal from the decision of the judge of the Lancaster county court: —

This was an action brought to recover the sum of 50*l.* in full discharge of all demands by the plaintiffs against the defendant in the cause of action hereinafter more particularly mentioned. It was tried, without a jury, on the 1st of April, 1854, when it was admitted by both sides that the facts were as follows: The Northwestern Railway Company was incorporated by the Northwestern Railway Act, 1846, which is a public act to be judicially taken notice of as such. That act, and the several acts referred to therein and incorporated therewith, are to be considered as forming part of this case. The purposes of the incorporation of the company are in the first-mentioned act stated to be the making and maintaining certain railways therein specified, and for other the purposes therein and in the said incorporated acts contained. The trading in coal is not anywhere

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expressed to be one of such purposes. In the year 1851, the Northwestern Railway Company began to purchase coals in Yorkshire for the purpose of conveying them along their lines of railway from Lancaster and other places, and then selling them, (that being considered by the plaintiffs a beneficial mode of providing traffic for their said railway,) and the said company being for that purpose in want of an agent to sell such coals for them at Lancaster, they, upon the said defendant and the several other persons hereinafter mentioned becoming the obligors of the bond also hereinafter mentioned, appointed one Thomas Latham to be their clerk or agent there, for the sole purpose of selling such coals for them as aforesaid, the said company taking from the defendant and the said other persons the said bond as a security for the faithful conduct of the said Thomas Latham as such clerk or agent. The said bond and the conditions thereof were as follows: "Know all men by these presents, that we, Thomas Rowlandson Dunn, of Lancaster, in the county of Lancaster, gentleman, Edward Whinray, of Lancaster aforesaid, tobacconist, John Walker of Lancaster aforesaid, gentleman, John Gardner of Lancaster aforesaid, brewer, and George Cooper Hatton of Lancaster aforesaid, silversmith, are held and firmly bound unto the Northwestern Railway Company in the penal sum of 250*l.* of lawful money of Great Britain, to be paid to the said Northwestern Railway Company, or their certain attorney, successors, or assigns, for which payment to be well and truly made we bind ourselves and each of us, and any two, three, or four of us, our and each of our heirs, executors, and administrators, jointly, severally, respectively, and firmly by these presents, sealed with our seals, dated this 31st day of January, A. D. 1851. Whereas the above-named Northwestern Railway Company have agreed to appoint Thomas Latham, of Lancaster, schoolmaster, as their clerk or agent at Lancaster above mentioned, for the purpose of selling coal for the said company, at a yearly salary of 100*l.* per annum on his obtaining sufficient sureties for his duly and faithfully accounting to them the said company in manner hereinafter mentioned, and for his faithful and honest conduct during the time of his continuance in such coal agency; and the above bounden Thomas Rowlandson Dunn, Edward Whinray, John Walker, John Gardner, and George Cooper Hatton have, at the request of the said Thomas Latham, and with the approbation of the said Northwestern Railway Company, agreed to become such sureties, and have for the purpose executed the above-written bond or obligation. Now, the condition of the above-written obligation is such that if the said Thomas Latham shall and do from time to time and at all times whenever thereunto required well and satisfactorily account for and pay over and deliver to the said Northwestern Railway Company and their survivors, all and every sum and sums of money and securities for money, goods, and effects whatsoever which he, the said Thomas Latham, shall receive for their, any, or either of their use, or which shall at any time or times be entrusted to his care by them or any of their correspondents or customers or others to whom they are or shall be liable or accountable, and also shall and do keep all papers and

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receipts, books of account, which books shall be the property of the said company and their successors, and do not at any time embezzle, make away with, obliterate, deface, or in anywise injure any of the money, securities for money, books, papers, writings, goods, or effects of them, the said company or their successors, or any of their correspondents or customers, or others, to whom they are or shall be liable or accountable, then and in such case the above-written obligation to be void and of no effect, otherwise to be and remain in full force and virtue. Provided always, nevertheless, and it is hereby declared, that each of them, the said Thomas Rowlandson Dunn, Edward Whinray, John Walker, John Gardner, and George Cooper Hatton, is not to be, nor are his executors or administrators to be separately liable for more than 50*l.*, parcel of the said sum of 250*l.* mentioned in the said above-written bond or obligation. Provided also, that each of them, the said Thomas Rowlandson Dunn, Edward Whinray, John Walker, John Gardner, and George Cooper Hatton, shall be at liberty to put an end to his liability on the above bond or obligation on giving to the said Northwestern Railway Company or their successors six months' notice in writing of his intention so to do. As witness our hands and seals the day and year first above written.

“ THOMAS RICHARDSON DUNN, (L. s.)

“ EDWARD WHINRAY, (L. s.)

“ JOHN WALKER, (L. s.)

“ JOHN GARDNER, (L. s.)

“ GEORGE COOPER HATTON, (L. s.)”

The several persons who became obligors of the said bond before and at the time of their doing so were respectively well aware of all the circumstances hereinbefore mentioned. Immediately upon the execution of the said bond, the said Thomas Latham entered upon the performance of his duties as such clerk or agent, and continued in the same service without any alterations in the duties or responsibilities thereof until the autumn of the year 1852. He continued the same employment at the fixed salary in the bond mentioned until the month of May, 1851, when the plaintiffs proposed to the said Thomas Latham to substitute for the said salary mentioned in the said bond a commission of 6*d.* per ton on all the coal for which he should obtain orders, or which should be supplied to parties to whom he had up to that time sold. The said Thomas Latham agreed to this change in the mode of remunerating his services, and the plaintiffs from that time paid or allowed him the commission aforesaid in lieu of the said yearly salary for his said services. The defendant did not at any time give notice to the said company of his intention to put an end to his liability on the said bond. From that time forward until the end of his employment, the said Thomas Latham was paid for his services by such commission, which had been calculated by the said plaintiffs and the said Thomas Latham to amount, and in fact amounted, to a larger sum than the said fixed salary. In the autumn of 1852, it was found that the said Thomas Latham was

indebted to the said plaintiffs in the sum of 245*l.* 14*s.* 11*d.* for sums received by him for them by virtue of his said employment, and not by him paid over to them; and it was admitted by the defendant that if the objections relied upon by him as hereinafter mentioned did not afford him a good defence, the plaintiffs were entitled to recover from him the full amount of 50*l.*, the sum sought to be recovered in this action, and the whole of which is for the purposes of this cause to be taken as having been received by the said Thomas Latham after the above-mentioned change in his salary.

The defendant rested his defence upon two objections: First, that the bond was void *ab initio*, because the company was not authorized by law to trade in coal in manner aforesaid, nor to appoint a clerk or agent for the purpose stated in the said bond; secondly, that the change which had been made in the mode of remunerating the said Thomas Latham for his services as such clerk or agent was such that the defendant was not bound by the said bond in respect of sums subsequently received by the said Thomas Latham.

The plaintiffs, in answer to the first objection, contended that, assuming them to have had no authority to trade in coals as above mentioned, a bond for the faithful and honest conduct of their servant and agent employed in such trade was, nevertheless, valid, and that, even if this objection would have been available if made by an obligor who had executed the bond in ignorance of the circumstances of the case, it was not available for the present defendant, he and the other obligors having respectively executed the bond with full knowledge of the circumstances connected with such trading and carrying of coals by the plaintiffs. As to the second objection, the plaintiffs contended that the above-mentioned change in the mode of remuneration did not discharge the defendant with respect to sums subsequently received by the said Thomas Latham. The learned judge allowed both the objections, and gave judgment for the defendant. The plaintiffs forthwith gave proper notices of dissatisfaction and appeal, and took all the proper steps in that behalf pursuant to the statute in such case made and provided.

The question for the opinion of the Court of Exchequer was, whether the judge of the county court was right in allowing both of the said objections or either of them. If he was right in allowing both of the said objections or either of them, the judgment of the county court is to stand confirmed. If he ought to have disallowed both of them, the judgment of the county court was to be vacated and judgment entered for the plaintiffs for 50*l.*, or such other order was to be made or judgment given as to the said Court of Exchequer should seem fit.

Hall, for the appellants, the plaintiffs below. First, the question as to the right of the company to deal in coal does not arise in this action. There is nothing in the bond to raise the point. Secondly, the sureties are liable. There was no change in the office. The change of the remuneration did not make it a different office.

[PLATT, B. The clerk ran a risk of getting less than before by the change in the mode of remuneration.]

OF EXCHEQUER, 1854.

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the said Northwestern Railway Company or
months' notice in writing of his intention so to
hands and seals the day and year first above

"THOMAS RICHARDSON DUNN, (L. S.)
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to substitute for the said salary mentioned in the
mission of 6d. per ton on all the coal for which
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the mode of remunerating his services, and the pla-
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pinion.

Appeal dismissed.

solvent.

assigned to the plaintiff all
his live and dead farming
about the same, and upon
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21st of February, 1849,
ntiff, under the powers
of some crops of grain
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of the plaintiff. The
st S. was delivered to
the 8th of March, S.
16, and 7 & 8 Vict. c. 96.
and other things seized as
the Court of Chancery to
afterwards dismissed, upon
e latter then abandoned all
in possession; and the crops
the plaintiff:—

the plaintiff was entitled to the

, and, after writ issued, the
ct. c. 76, to state the following

548, the plaintiff advanced from
Hall, who was then the owner and
and premises at Haversham, in the
of a farm and lands there, sev-
amounting in the whole to

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1,000*l.* 18*s.* 7*d.*, and for securing their repayment, Mr. Small, by a deed, dated the 26th of January, 1848, made between himself of the one part, and the plaintiff of the other part, after reciting certain advances made by the plaintiff, assigned and transferred all his household goods in and about his said dwelling-house, and all his live and dead farming stock, crops of grain, and the whole of his personal estate in and about the same, and upon and about his said farm and lands; to hold the same unto the plaintiff, his executors, administrators, and assigns, as a security for the payment of the said sums of money, and of all such further sums as the said H. A. Small might thereafter owe and become indebted to the plaintiff, not exceeding in the whole 2,000*l.*; and by the said indenture it was declared and agreed that it should be lawful for the plaintiff, his executors or administrators, by virtue of the said indenture, at any time or times to seize and take possession of the said household goods, live and dead farming stock, crops of grain and hay and other effects and premises thereby bargained and sold, and of all such live and dead farming stock, crops, and implements of husbandry, and other effects, which should or might, from time to time be substituted in lieu of the said stock, crops, and implements of husbandry thereby assigned, or any part thereof, or which should for the time being be found in or about the messuage or dwelling-house, farm, lands, and premises, at Haversham aforesaid, or any or either of them, either in the lifetime or after the decease of the said H. A. Small, and the same to sell and dispose of by public auction or private contract, in such manner as the plaintiff, his executors, or administrators, should deem expedient, and out of the moneys which should arise from such sale, to pay and discharge all costs, &c., and after payment thereof to take and retain all moneys due to the plaintiff, and pay the remainder to the said H. A. Small.

On the 26th of February, 1848, Mr. Congreve advanced to Mr. Small the further sum of 25*l.*, and on the 20th of May, in that year, the sum of 100*l.* upon the security of the said deed, and on the terms therein mentioned.

On the 21st of February, 1849, a sum of 1,297*l.* 18*s.* 7*d.* being then due to him under the said deed, the plaintiff, under the powers thereby granted, seized and took possession (amongst other things) of some crops of grain then growing upon the said farm and lands, and which had been sown by the said H. A. Small, subsequently to the execution of the said deed. The plaintiff, on the same day, placed a man in possession of the said crops, who remained in possession of the same on behalf of the plaintiff until the sale thereof, as hereinafter mentioned. All this took place without any other license or consent on the part of H. A. Small beyond that contained in the said deed. The crops and other things were not of sufficient value to repay to the plaintiff the amount then due to him from Mr. Small.

In Trinity term, 1848, the defendant recovered judgment in an action brought against the said H. A. Small for the sum (including costs) 310*l.* 19*s.* 3*d.*, and on the 22d of February, 1847, a writ of *fieri facias* (indorsed to levy 310*l.* 19*s.* 3*d.*, and interest, at 4*l.* per cent.

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from the 15th of August) was issued on such judgment, and delivered to the sheriff of Bucks, for execution, who, on the same day, seized thereunder (amongst other things) the said crops of grain above referred to, and of which the plaintiff was then in possession, as aforesaid. At that time, a sum exceeding the value of the crops and other things seized under the said deed, remained due to the plaintiff, and is still unpaid.

On the 8th of March, 1849, Mr. Small presented his petition for protection, to the Court for the Relief of Insolvent Debtors, under the provisions of the 5 & 6 Vict. c. 116, and the 7 & 8 Vict. c. 96, which was duly filed under the said acts. The official assignee, in the first instance, claimed the crops and other things seized, as above mentioned, by the plaintiff, and a bill was filed by him in the Court of Chancery, to restrain the plaintiff from selling the same. This bill was afterwards dismissed, upon terms agreed on between the plaintiff and the assignee, and the latter then abandoned all claim to such crops and other things, and has not since claimed to have any title to the same.

The sheriff continued in possession of the crops under the defendant's writ, until the 25th of July, 1849, when the same were sold and produced the sum of 294*l.*, and for the purpose of this case, it was to be taken that such sale was made by the sheriff under the said writ, and that the proceeds were received by the defendant. The question for the opinion of the court was, whether the plaintiff was entitled to recover the value of the said crops.

If the court should be of opinion that he was so entitled, judgment was to be entered for the plaintiff for the sum of 294*l.*, and costs. If the court should be of a contrary opinion, judgment of *non pros.*, with costs of defence, was to be entered.

Phipson, (with him *Mellor*,) for the plaintiff.¹ It is conceded that the deed did not, of itself, pass the future crops, as decided in *Lunn v. Thornton*, 1 Com. B. Rep. 379, but it conferred a power on the plaintiff, and when he executed that power, he acquired a title as against all the world. It was just the same as if the donor had actually delivered the specific crops to him.

[PARKE, B. They were not delivered to him.]

The effect of the deed is to give him a power to sell whatever he seizes under it, and upon seizure, he acquires a special property, which puts it out of the power of the licensor to interfere, although he may still have a general property so as to be entitled to any excess. It is like a lien, and goods pledged cannot be seized, because they cannot be sold. *Legg v. Evans*, 6 Mee. & W. 36. The power was coupled with an interest, and was irrevocable, at least, as against the donor of the power. *Wood v. Leadbitter*, 13 Ibid. 838; *Wickman v. Hawker*, 7 Ibid. 63; and *Muskett v. Hill*, 5 Bing. N. C. 694.

[MARTIN, B., referred to *Howes v. Ball*, 7 B. & C. 481.]

¹ June 16, before PARKE, B., ALDERSON, B., PLATT, B., and MARTIN, B.

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In *Freeman v. Edwards*, 2 Exch. Rep. 732, which may be relied upon by the other side, a power to the mortgagee to distrain for the interest in arrear, was held not to operate against the assignees, but that decision was founded upon the fact that, before the execution of the power to distrain, the mortgagor had become bankrupt, and so the goods ceased to belong to him. Then, assuming that these crops were not the property of the plaintiff, the defendant says, that the effect of the insolvency is to set aside the license conferred by the deed, and to give the goods to the execution creditor, relying on the decisions of *Goldschmidt v. Hamlet*, 6 Man. & G. 187, and *Graham v. Witherby*, 7 Q. B. Rep. 491. But, it is submitted, that he cannot set up the title of the assignees, when they themselves have withdrawn their claim. Nor can the court be asked in a suit, to which the assignees are not a party, to decide upon their title to the goods; and yet, before the defendant can establish his title, the court must decide, first, that the plaintiff's title is cut down by the insolvency, and next, that the legitimate effect of that insolvency, is not to follow, namely, that the assignees are not to take these crops, but the defendant is. Those cases, moreover, were wrongly decided, because the 6 Geo. 4, c. 16, s. 108, to which the 7 & 8 Vict. c. 96, s. 21,¹ is similar, intended only to set aside the particular execution for the benefit of the other creditors, and to compel the execution creditor to come in *pari passu* with them, which could only be done by holding that the assignees are to take what the execution creditor otherwise would have done.

[ALDERSON, B. Those decisions certainly seem quite contrary to principle.]

PARKE, B. The meaning of the statute is, that the general rights of the assignees are not to be defeated by any bill of sale after the insolvency.]

In *Simpson v. Wood*, 7 Exch. Rep. 349; s. c. 12 Eng. Rep. 558, the assignees were held not to be entitled, because the bill of sale had effectually transferred the property before the insolvency. The case that now arises was put by Wightman, J., in the course of the argument in *Graham v. Witherby*. "Suppose," said his lordship, "in a case where the execution was invalid by section 108, the assignees would not interfere, could the second creditor then contest the pro-

¹ That section enacts: "That where any petitioner for protection from process, whose estate shall have been vested in an assignee or assignees under the provisions of the said recited act and of this act or of either of them, shall have executed any warrant of attorney to confess judgment, or shall have given any *cognovit actionem* or bill of sale, whether for a valuable consideration or otherwise, no person shall, after the filing of the petition of such petitioner, avail himself of any execution issued or to be issued upon any judgment obtained or to be obtained upon such warrant of attorney or *cognovit actionem*, either by seizure and sale of the property of such petitioner or any part thereof, or by sale of such property theretofore seized, or any part thereof, or avail himself of such bill of sale, but that any person or persons to whom any sum or sums of money shall be due in respect of any such warrant of attorney or *cognovit actionem*, or of such bill of sale, shall and may be a creditor or creditors for the same under the said recited act and this act."

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ceeds of execution?" To which Mr. Willes answered: "He could not, because section 108, was intended for the benefit of the assignees representing the general creditors, not for the benefit of any individual creditor whose execution might stand next in order to that which is defeated."

[ALDERSON, B. That answer seems to me to be good law.]

Hayes, for the defendant. The plaintiff claims the proceeds of these goods, and must make out that he is entitled. If, therefore, it is shown that the goods belonged to a third party, the defendant must succeed, and for this purpose, it is not material to consider whether the title of the third party is affected in any other way. The defendant is not estopped from setting up the right of the assignee, as in *Leake v. Loveday*, 2 Dowl. P. C. (N. S.) 624; where the defendant set up the title of the assignees to cut down the possessory title of the plaintiff. Then, by the 4th section of the 7 & 8 Vict. c. 96, all the property of the insolvent vests in the assignees, and under section 21, no person can, after the filing of the petition, avail himself of a bill of sale given by the insolvent. The consequence of setting aside the seizure under the bill of sale is, according to *Goldschmidt v. Hamlet*, and *Graham v. Witherby*, to allow the execution creditor to reap the benefit of his *bonâ fide* execution. Those cases, which were fully argued and considered, are not to be overruled by a court of coördinate jurisdiction, especially when no writ of error can be brought upon this special case. *Simpson v. Wood*, does not apply, because there the property had ceased to be the insolvent's before the insolvency. But the chief point, and that on which, perhaps, both questions may turn, is, whether the bill of sale did confer any absolute property by reason of the seizure. *Lunn v. Thornton*, shows that ordinary words will not pass future effects, although, as decided in *Petch v. Tutin*, 15 Mee. & W. 110, a deed might be so framed as to pass the tenant's interest in future crops. Here, the bill of sale related to no specific crops, and at most, could only give an equitable interest. There is no title derivable from a half-executed power, and the license here given, was to seize and sell, so that until sale, no property passed under the power. The plaintiff was there only as a servant of the donor of the power, who could at any time have revoked the authority. No fresh act of ratification was done by Mr. Small. *Lunn v. Thornton*, *Gale v. Burnell*, 7 Q. B. Rep. 850. The judgment of Lord Tenterden in *Howes v. Ball*, supports the defendant's view.

Phipson, in reply. *Stevenson v. Newnham*, 22 L. J. Rep. (N. S.) C. P. 110; s. c. 16 Eng. Rep. 401, shows that the title of the assignees cannot be set up by a third party when they have not enforced it themselves.

Cur. adv. vult.

Judgment was now delivered by

PARKE, B. [After stating the facts of the case his lordship pro-

ceeded.] There are two questions in this case: the first is, whether, supposing Mr. Small, the debtor, had not become insolvent, the plaintiff had a good title to the growing crops as against the execution creditor; and the second is, whether his having become insolvent makes any difference. Under the bill of sale, it was conceded on both sides, that though the then growing crops passed on the execution of the deed, the future crops did not. As to those, the plaintiff was authorized to seize and take possession of all or such as might be substituted for those then existing, to sell and dispose of and pay the costs, &c., as well as the residue of the moneys unpaid, secured by the bill of sale; and under this power the plaintiff seized and took possession of the growing crops in question on the 21st of February; and the day after, a writ of *fi. fa.* on the defendant's judgment indorsed to levy 310*l.* 17*s.* 2*d.*, was delivered to the sheriff, who seized and sold for the sum of 294*l.* The plaintiff contended, that having actually taken possession of the growing crops long before the delivery of the writ, he was really in possession of them, and could bring an action against any one for taking them, and his title ought to prevail against that of the defendant, and we think he was so entitled. If the authority given by the debtor by the bill of sale had not been executed, it would have been of no avail against the execution. It gave no legal title or any equitable title to any specific goods; but when executed, not fully and entirely, but only to the extent of taking possession of the growing crops, it is the same in our judgment as if the debtor himself had put the plaintiff in actual possession of those crops — whether the debtor gives the possession of a chattel by delivery with his own hands, or points it out and directs the creditor to take it, or tells him to take any he pleases, for the payment of his debt by the sale of it, the effect after actual possession by the creditor is the same. We all think, therefore, that, but for the insolvent act, the 7 & 8 Vict. c. 96, s. 21, the plaintiff had a right to recover; nor should we have had any doubt that the insolvency of the defendant and his having petitioned the Insolvent Court subsequent to the seizure, and before the sale, made no difference, if we were unfettered by authorities on the subject. But the question turns on the 21st section of the 7 & 8 Vict. c. 96, which provides “that in all cases where any petitioner for protection from process, whose estate shall have been vested in an assignee or assignees under the provisions of the said recited act, 3 Geo. 4, c. 39, and of this act or either of them, shall have executed any warrant of attorney to confess judgment, or shall have given any *cognovit actionem*, or bill of sale, whether for a valuable consideration or otherwise, no person shall, after the filing of the petition of such petitioner, avail himself of any execution issued or to be issued upon any judgment obtained or to be obtained upon such warrant of attorney or *cognovit actionem*, either by seizure and sale of the property of such petitioner or any part thereof, or by sale of such property theretofore seized, or any part thereof, or avail himself of such bill of sale; but that any person or persons to whom any sum or sums of money shall be due in respect of any such warrant of attorney or

cognavit actionem, or of such bill of sale, shall and may be a creditor or creditors for the same under the said recited act and this act."

That clause applies to creditors by judgment or bill of sale, on which some further step is necessary to be done to make it effectual, as explained in the case of *Simpson v. Wood*, and this bill of sale is of that nature because as to future crops it required an actual seizure to give it operation. The meaning of the section clearly is, that no creditor has a right to avail himself of such bill of sale to prejudice the other creditors under the insolvency, or to take a larger share of the insolvent's effects than would fall to him if they were distributed amongst the creditors equally if there was no such bill of sale. It makes, therefore, a *fi. fa.* and warrant of attorney not completely executed by a sale, and bill of sale not completely executed, inoperative to transfer the property before the petition as against the assignee. In all cases, therefore, where the effect of execution and operation of the bill of sale would be to take the property from the assignees, the creditor cannot avail himself of it. There is not the slightest reason for postponing such an execution or bill of sale when the result would be to put the property seized into the hands of the subsequent execution creditor, and no part of it would go to the assignees for the benefit of the general creditors entitled to share the insolvent's effects in ratable proportions. In the present case the plaintiff, a creditor, with a bill of sale to secure 1,297*l.* 18*s.* 6*d.*, seeks to enforce it by a sale of the effects of the insolvent, which produced 294*l.*, and which the defendant claims as due to him under an execution for 310*l.* 9*s.* 2*d.* The consequence of holding the plaintiff's bill of sale inoperative altogether would be to give the 294*l.* to the defendant, and nothing, whatever, to the assignees; and the other creditors, through them, would not profit in the least. Therefore, if there be no binding authority to the contrary, we should hold, that the plaintiff, who had a prior right by virtue of the bill of sale against the execution creditor, though not against the insolvent's assignees, had a clear right to recover the proceeds in this case, even if these assignees had not, as they have done, withdrawn from contesting the plaintiff's right.

What the effect would be if the sheriff had seized more and sold more goods of the insolvent than would satisfy the defendant's execution, is another question, not necessary now to be decided; but, as to the surplus, as he would possibly be liable to the assignee, he might have a good defence against the plaintiff. The only question which remains is, whether there are any authorities against the plaintiff? The first relied on is the case of *Goldschmidt v. Hamlet*. The question between the creditor on a judgment or warrant of attorney and the first creditor upon an adverse judgment was not the subject of any one issue in that case, and was never presented in a proper shape to the court in the course of the argument, as the direct subject of the decision. The observations of the judges on the other issues, no doubt, were unfavorable to the plaintiff's case, but the assignees being in that case clearly entitled to nothing, the court do not seem to have fully considered the question as to the right of the plaintiff against the other execution creditor. A similar observation may be

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made on the case of *Graham v. Witherby*, which proceeded partly on *Goldschmidt v. Hamlet*. Many of the observations made by Lord Denman, in giving judgment, are decidedly favorable to the view we take; and, indeed, we may say, if the case of *Cheston v. Gibbs*, 12 Mee. & W. 111, had not been thought by the court to be contrary to that view, they would have decided that case as we decide this, and their decision appears to have been founded upon a mistaken view of the opinion of the court in *Cheston v. Gibbs*. This court decided that the 108th section of the bankruptcy act affected the operation of the writ, and did not merely direct the application of the money levied under it, and that the sheriff was a wrongdoer in acting contrary to the statutory direction coupled with the direction of the writ. We never held the writ to be void, as the Court of Queen's Bench seem to have supposed, in *Graham v. Witherby*, in the report of the judgment at page 515, and from that they deduced the consequence that it was void altogether, and so the defendant's writ in that case was, therefore, the first valid writ. We never meant to say more than that the sheriff, in disobeying the plaintiff's writ, and the clauses in the act of parliament directing its operation, was dealing wrongfully with the goods which, but for the writ, would be the property of the assignees, and therefore responsible in an action of trover. We cannot, therefore, consider that either of these cases bind us as authorities, and we pronounce our judgment for the plaintiff.

Judgment for the plaintiff.

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July 7, 1854.

Costs of Demurrer — Withdrawal of Juror.

Under the 3 & 4 Will. 4, c. 42, s. 84, the party who is successful upon a demurrer is entitled to a judgment for his costs irrespective of the termination of the suit; and where such judgment had been given for the plaintiff prior to the trial of the issues in fact, the withdrawal of a juror, with an agreement that no further action was to be brought, was —

Held, to be no waiver of the plaintiff's right to these costs.

In this case the defendant demurred to the declaration. Upon the demurrer, judgment was given in favor of the plaintiff; an application was then made to change the venue, when the following order was made: "Upon hearing the attorneys, &c., I do order that the venue be changed to Middlesex; that the costs of the application to set aside the demurrer, and to amend and change the venue, abide the result of the demurrer; that defendant shall, within seven days,

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pay 60*l.* into court, and shall pay the costs of the day, if any, to be taxed. Dated the 31st of March, 1854.

(Signed)

"W. H. MAULE."

The 60*l.* was paid accordingly. When the cause came on for trial, before Parke, B., at the Sittings for Middlesex, in Trinity term, at his lordship's recommendation it was agreed that a juror should be withdrawn, and no further action brought. An application was afterwards made by the defendant, to Parke, B., at chambers, to order the money to be paid out of court; which his lordship refused, unless the costs of the demurrer were paid.

A rule *nisi* was then obtained to set aside the order of his lordship, against which

Milward showed cause.¹ The plaintiff had a vested right in these costs as soon as judgment was pronounced in his favor upon the demurrer, under the 3 & 4 Will. 4, c. 42, s. 84, which enacts that, "where judgment shall be given either for or against a plaintiff, or for or against a defendant, upon any demurrer joined in any action whatever, the party in whose favor it shall be given, shall also have judgment to recover his costs in that behalf." And by the 81st section of the Common Law Procedure Act, the costs of any issue, whether of fact or law, follow the finding a judgment upon such issue. He referred, also, to *The Mayor, &c., of Macclesfield v. Gee*, 13 Mee. & W. 470; Reg. Gen. H. T. 1853, r. 62; and *Elwood v. Bullock*, 6 Q. B. Rep. 383. This right was not given up by the withdrawal of a juror, for that does not necessarily put an end to the suit. *Harries v. Thomas*, 2 Mee. & W. 32.

Jones, in support of the rule. The plaintiff cannot get the costs on this record without a judgment for his damages under the statute of Gloucester, and the language of the subsequent statutes must be construed in connection with that statute under which costs were first given. He referred to *Partridge v. Gardner*, 4 Exch. Rep. 303; *Scott v. De Richebourg*, 11 Com. B. Rep. 477; s. c. 6 Eng. Rep. 374. At the trial, the intention clearly was to put an end to all litigation between the parties, even if the withdrawal of a juror did not necessarily have this effect. *Gibbs v. Ralph*, 14 Mee. & W. 804.

Cur. adv. vult.

Judgment was now delivered by

PARKE, B. After stating the facts, his lordship said: The question is, whether, the money being now to be paid out of court, the plaintiff is entitled to have the costs of the demurrer, on which he has succeeded. He was not entitled to have the remainder of the money paid out of court, because he had not succeeded at the trial. Upon

¹ June 15, before POLLOCK, C. B., PARKE, B., PLATT, B., and MARTIN, B.

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receipts, books of account, which books shall be the property of the said company and their successors, and do not at any time embezzle, make away with, obliterate, deface, or in anywise injure any of the money, securities for money, books, papers, writings, goods, or effects of them, the said company or their successors, or any of their correspondents or customers, or others, to whom they are or shall be liable or accountable, then and in such case the above-written obligation to be void and of no effect, otherwise to be and remain in full force and virtue. Provided always, nevertheless, and it is hereby declared, that each of them, the said Thomas Rowlandson Dunn, Edward Whinray, John Walker, John Gardner, and George Cooper Hatton, is not to be, nor are his executors or administrators to be separately liable for more than 50*l.*, parcel of the said sum of 250*l.* mentioned in the said above-written bond or obligation. Provided also, that each of them, the said Thomas Rowlandson Dunn, Edward Whinray, John Walker, John Gardner, and George Cooper Hatton, shall be at liberty to put an end to his liability on the above bond or obligation on giving to the said Northwestern Railway Company or their successors six months' notice in writing of his intention so to do. As witness our hands and seals the day and year first above written.

“ THOMAS RICHARDSON DUNN, (L. S.)

“ EDWARD WHINRAY, (L. S.)

“ JOHN WALKER, (L. S.)

“ JOHN GARDNER, (L. S.)

“ GEORGE COOPER HATTON, (L. S.)”

The several persons who became obligors of the said bond before and at the time of their doing so were respectively well aware of all the circumstances hereinbefore mentioned. Immediately upon the execution of the said bond, the said Thomas Latham entered upon the performance of his duties as such clerk or agent, and continued in the same service without any alterations in the duties or responsibilities thereof until the autumn of the year 1852. He continued the same employment at the fixed salary in the bond mentioned until the month of May, 1851, when the plaintiffs proposed to the said Thomas Latham to substitute for the said salary mentioned in the said bond a commission of 6*d.* per ton on all the coal for which he should obtain orders, or which should be supplied to parties to whom he had up to that time sold. The said Thomas Latham agreed to this change in the mode of remunerating his services, and the plaintiffs from that time paid or allowed him the commission aforesaid in lieu of the said yearly salary for his said services. The defendant did not at any time give notice to the said company of his intention to put an end to his liability on the said bond. From that time forward until the end of his employment, the said Thomas Latham was paid for his services by such commission, which had been calculated by the said plaintiffs and the said Thomas Latham to amount, and in fact amounted, to a larger sum than the said fixed salary. In the autumn of 1852, it was found that the said Thomas Latham was

indebted to the said plaintiffs in the sum of 245*l.* 14*s.* 11*d.* for sums received by him for them by virtue of his said employment, and not by him paid over to them; and it was admitted by the defendant that if the objections relied upon by him as hereinafter mentioned did not afford him a good defence, the plaintiffs were entitled to recover from him the full amount of 50*l.*, the sum sought to be recovered in this action, and the whole of which is for the purposes of this cause to be taken as having been received by the said Thomas Latham after the above-mentioned change in his salary.

The defendant rested his defence upon two objections: First, that the bond was void *ab initio*, because the company was not authorized by law to trade in coal in manner aforesaid, nor to appoint a clerk or agent for the purpose stated in the said bond; secondly, that the change which had been made in the mode of remunerating the said Thomas Latham for his services as such clerk or agent was such that the defendant was not bound by the said bond in respect of sums subsequently received by the said Thomas Latham.

The plaintiffs, in answer to the first objection, contended that, assuming them to have had no authority to trade in coals as above mentioned, a bond for the faithful and honest conduct of their servant and agent employed in such trade was, nevertheless, valid, and that, even if this objection would have been available if made by an obligor who had executed the bond in ignorance of the circumstances of the case, it was not available for the present defendant, he and the other obligors having respectively executed the bond with full knowledge of the circumstances connected with such trading and carrying of coals by the plaintiffs. As to the second objection, the plaintiffs contended that the above-mentioned change in the mode of remuneration did not discharge the defendant with respect to sums subsequently received by the said Thomas Latham. The learned judge allowed both the objections, and gave judgment for the defendant. The plaintiffs forthwith gave proper notices of dissatisfaction and appeal, and took all the proper steps in that behalf pursuant to the statute in such case made and provided.

The question for the opinion of the Court of Exchequer was, whether the judge of the county court was right in allowing both of the said objections or either of them. If he was right in allowing both of the said objections or either of them, the judgment of the county court is to stand confirmed. If he ought to have disallowed both of them, the judgment of the county court was to be vacated and judgment entered for the plaintiffs for 50*l.*, or such other order was to be made or judgment given as to the said Court of Exchequer should seem fit.

Hall, for the appellants, the plaintiffs below. First, the question as to the right of the company to deal in coal does not arise in this action. There is nothing in the bond to raise the point. Secondly, the sureties are liable. There was no change in the office. The change of the remuneration did not make it a different office.

[PLATT, B. The clerk ran a risk of getting less than before by the change in the mode of remuneration.]

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my said last-mentioned son, shall cease, determine, and be wholly extinguished." After the death of the testator, the defendant, Raleigh Trevelyan, executed a deed-poll in the following terms: "Whereas the said W. Trevelyan died on or about the 10th of June, 1819, and his said will and codicils were soon after proved by the executors therein named. And whereas the said R. Trevelyan, in the month of June, 1819, intermarried with Elizabeth Grey, daughter of Robert Grey, of Shenston, in the said county of Northumberland, Esq., and she is still living and the wife of the said R. Trevelyan. Now, know ye, and these presents witness, that I, the said Raleigh Trevelyan, by virtue of my said recited power and of every other power enabling me in this behalf, do by this deed settle and appoint an annuity of 300*l.* per annum upon my said wife, Elizabeth Trevelyan, by way of jointure, and I declare that the same shall be charged upon the real estate of the same testator in like manner as the annuity or yearly sum of 300*l.* by the said will devised to, or in trust for, me, is by the said will charged therein. In witness whereof," &c.

For the plaintiff, it was contended that the effect of the will and codicil, and deed-poll was, that the wife of Raleigh Trevelyan took no estate in the annuity until the death of her husband, the other defendant, and that the defendant, Raleigh Trevelyan, after the execution of the deed-poll, had no estate in the annuity, and, consequently, that the distress was illegal. The learned judge overruled the objection, reserving the point, and the defendants had a verdict, leave being reserved to the plaintiff to move to enter a verdict for him.

Knowles having obtained a rule *nisi* accordingly, and also for judgment *non obstante veredicto*,

Watson, *Hill*, and *Willes* showed cause. The defendants were entitled to distrain. The question turns on the meaning of the will and codicil. The defendants contend that they were entitled to distrain for the arrears of the annuity; the plaintiff, on the other side, insists that, by reason of the introduction of the words, "by way of jointure," the right to receive the annuity was postponed till the death of the husband, Raleigh Trevelyan, and that it would then, and not till then, vest in the defendant, Elizabeth. The doctrine of ademption will be relied on by the other side, but that doctrine does not apply to this case, which is one of real estate, but solely to chattels. It is, moreover, an equitable doctrine, and on that account is inapplicable.

[*Knowles* intimated that he should not insist on that point.]

The question then arises on the motion for judgment *non obstante veredicto*. The effect of the words of the will is not that the defendant, Elizabeth, is to have the annuity only on her becoming a widow. The words, "by way of jointure," by no means signify that the estate is only to take effect on the death of the husband. If that had been the meaning of the testator, he would have expressed himself to that effect in clear language. The 27 Hen. 8, c. 10, s. 6, and the second resolution in *Vernon's case*, 4 Rep. 1; *Ibid.* b. 2, referring to *Ashton's case*, show that the word "jointure" has not the meaning contended for by the other side.

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[PLATT, B. In Jacob's Law Dictionary, the word "jointure" is thus defined: "A jointure is a settlement of lands and tenements made to a woman in consideration of marriage; or it is a covenant whereby the husband, or some friend of his, assured to the wife lands or tenements for term of her life."]

In Co. Lit. 36, b, the following passage occurs: "Concerning the first, if a man make a feoffment in fee of lands or tenements either before or after marriage to the use of the husband for life, and after to the use of A for life, and then to the use of the wife for life in satisfaction of the dower, this is no jointure within the statute." The effect of the words, "by way of jointure," is not to postpone the annuity till the death of Raleigh Trevelyan.

[ALDERSON, B. By the language of the codicil, one annuity is to be "by way of annuity," but if the other side is correct, that the annuity does not take effect till the death of R. Trevelyan, there is no substitution at all.]

Knowles, Raymond, and Quain, in support of the rule. The plaintiff is entitled to succeed. This annuity was not intended to begin until the death of the husband, R. Trevelyan. The word "jointure" means an estate that is not to take effect until the death of the husband.

[POLLOCK, C. B. That is not a very natural construction. The testator granted his son an annuity during his life, but you contend that, in the event of his marrying, his father intended that that annuity should cease, and be postponed till his son's death. You must contend that, if R. Trevelyan conferred this annuity upon his wife, he lost his own.]

The term "jointure," does not mean the giving a joint estate. It is to be taken in its popular signification, and what that is, is shown by the 27 Hen. 8. In 2 Black. Com. 137, "jointure" is thus defined: "A jointure which, strictly speaking, signifies a joint estate, limited to both husband and wife, but, in common acceptation, extends also to a sole estate limited to the wife only, is thus defined by Sir Edward Coke: 'A competent livelihood of freehold, for the wife, of lands and tenements; to take effect in profit or possession presently after the death of the husband, for the life of the wife at least.'" Dower is to take effect on the death of the husband, and jointure is to take effect at the same time. Bac. Abr. tit. "Dower," G, 1. Again, the court is to say whether the testator has sufficiently expressed his intention to give the larger estate in the manner contended for by the other side.

[ALDERSON, B. The term "jointure" may mean either an estate for the life of husband and wife, or after the death of the husband.]

It is to be borne in mind, that the construction contended for by the defendants, tends to divest the landowner of his property.

[ALDERSON, B. The testator gives an annuity to his son, and evidently intends to give him something more; your construction makes him give something less.]

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This is the case of a mere power of jointure. They cited *Wickham v Wickham*, 19 Ves. 419.

POLLOCK, C. B. This rule must be discharged. The question turns on what is the meaning of the clause in the will of Raleigh Trevelyan's father; the substance of which is this: There is, first, an annuity granted to him; that annuity is absolutely granted for his life; he is to have the full benefit of it; it is charged on other lands than those which he was to be possessed for life; it is charged, it is said, on some lands which went to some younger children. Now, he having that annuity of 300*l.* a year given him for his own life and for his own benefit, there comes this clause: that in case Raleigh Trevelyan should marry, it should be lawful for him, if he should think proper, to settle an annuity of 300*l.* per annum upon the woman he might happen to marry, for her life; that is, he has the power of settling an annuity upon his wife for life; but then, there comes the expression "by way of jointure," which I take to mean merely that it shall be given not, as is suggested by Mr. Quain, according to the popular notion of a jointure, namely, that is, something to be given to the woman, and that she is to have no benefit till her husband's death; but it is an annuity to be given to her for her life, only by way of jointure, that is, according to the provisions of the statute of the 37 Hen. 8, c. 3, which regulates these matters: therefore, if this were done before the marriage, it would be in bar of the dower; if it was done after the marriage, it would leave the woman the option to claim her dower and give up the annuity, or to keep the annuity and give up her dower, or she could have both. The will then says, that the annuity shall be charged upon the same premises on which the other is charged, in like manner as the same annuity of 300*l.*, by the same will, devised to the said Raleigh Trevelyan, has been charged; and that, in case the said Raleigh Trevelyan should so settle an annuity, or yearly rent-charge, on any wife he might happen to marry, it should be by way of substitution for the said annuity or yearly rent-charge so given and devised to him, the said Raleigh Trevelyan, in the said will. That is, there are not to be two annuities, but only one annuity, and that immediately on such substitution and settlement of the said annuity or rent-charge of 300*l.* by the said Raleigh Trevelyan, on the woman he might happen to marry. Certainly, all this language has a present aspect, and does not look like a postponement till his own death, the words being, "the said annuity or yearly rent-charge of 300*l.*, by the said will, given and devised to the said Raleigh Trevelyan, should cease and determine." It appears to me that, reading these words, looking at the grammatical meaning of them, looking at what, in all probability, anybody must have intended by such expressions, the effect and meaning is this: "I give to you, Raleigh Trevelyan, for your own benefit, an annuity of 300*l.* a year, for your life, but, if you happen to marry, I will allow you to settle it on your wife for her life, to begin now, and, instead of your receiving it then, it will be for her benefit; she will be entitled to it, but you, as her husband, will take it during her life; but this is to be done by

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way of jointure, that is, it is to be in bar of dower. It is not simply an annuity, but it is an annuity that she is to have for her life now, and in case of your death, if she survives you, she is to have it then in bar of dower." Possibly, although that question does not arise, it may have meant that the husband might have settled it on her by way of jointure. I am not quite sure that the annuity is taken for her life only. I think it would be far more reasonable to contend, that this settlement upon her by way of jointure, was for the joint lives of both. But that question, however, does not arise. But, with reference to the question that we have to determine, I entertain no doubt that the testator intended that the annuity should be enjoyed by the wife during the whole of her life, and in the event of her surviving her husband, that she should receive it by way of jointure in bar of dower.

ALDERSON, B. I am of the same opinion. The annuity is expressly granted to the wife for life. But, according to the argument for the plaintiff, it would not be for her life; it would be to her after the death of her husband for the remainder of her life. Then there are the words with respect to the jointure. Do they cut down that meaning? I do not think they do, because the words "by way of jointure," would not show that the annuity was not to be granted, that is to say, that it is to be taken in substitution of dower. It is a perfectly good jointure under the provisions of the statute, to give it to the wife for the whole of her life, beginning at the time when the deed is executed. Therefore, it seems to me that that would be a reasonable construction of the will, and the only reasonable construction of it for the purpose of giving effect to the words "for her life." But, then, let us see what the other parts of the case are, for, in my opinion, they confirm this view very clearly. The testator gives to his son an annuity for his son's life, and gives him a power which is obviously intended to be an additional benefit to him, of substituting his wife's life in case he should choose to marry. Surely, it would be no additional benefit to the son, if the substitution of the wife's life in place of his own, was only to be on condition that, during the remainder of his own life, his own previous annuity should cease. I cannot think that to have been the intention of the testator; the words are "for life," and full effect cannot be given to that, unless you make the annuity to begin immediately. If the annuity is to be given immediately, that gives full effect to the words "by way of jointure." Therefore, by this construction, I give effect to every word; which the argument of the other side does not. I think I also give effect to the fair intention of the testator, and the argument on the other side does not. In this case, therefore, the annuity was for the wife's life, beginning at the time the instrument was executed, and not beginning at the time the husband died, when there could be no substitution of the one for the other, seeing that the thing to be substituted must cease.

PLATT, B. I concur with the opinions which have been expressed

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by the Chief Baron and my brother Alderson, in the judgment which they have given, and also in the reasons which they have assigned. It may be further remarked, that, if this argument on the part of the objection to this annuity is to prevail, the words pointed at in the codicil, would be entirely got rid of, because it is most clearly given to the wife for life. The power is given to settle it on the wife for her life, and if she did not live as long as her husband, she never would have it at all. That would be a direct negative of the power that is given to the husband of settling it during the whole of her life. The words, "by way of jointure," do not appear to me to alter the case, because it is consistent with those words, that she might enjoy it during her own life, and also during the joint life, if she survived her husband.

MARTIN, B., had left the court before the conclusion of the argument.

Rule discharged.

ELLEN BANCKS v. JOHN OLLERTON.

June 7, 1854.

Contingent Remainder — Merger — Fines and Recoveries Act, 3 & 4 Will. 4, c. 74, s. 7. — Acknowledgment of Married Woman.

On the 8th of February, 1788, Richard Bancks, by his will, devised five houses, of which he was seised in fee, to Elizabeth, his wife, for life, and after her death he devised two of these houses to his daughter Ellen, the wife of G. Fleming, for her separate use, with power to dispose of the same at her death amongst her children; and after the death of his wife, Elizabeth, he devised the other three houses to Ellen Bancks, for her sole use, with power to dispose of the same to and among her lawful issue her surviving, and their heirs forever, as she should think fit. His will further provided, that if either Ellen Fleming, or Ellen Bancks should die without issue living at the time of their respective deaths, the survivor should have that which was thereinbefore given to the deceased party for her own use; and if both should die without issue them surviving, the testator gave all the property in equal shares amongst his brothers, sister, and others. The testator died in 1788, and Elizabeth Bancks his wife, entered into possession of the five dwelling-houses, and enjoyed the same up to her death in 1810. In 1798, Ellen Fleming intermarried with John Ollerton, the defendant, and died in 1848, without issue. On the death of Elizabeth Bancks, the plaintiff and the defendant, in right of his wife, respectively entered into possession of their respective shares of the said hereditaments. By indenture dated the 12th of May, 1848, and made between the defendant and his wife Ellen, of the first part, J. C., of the second part, John Lord and William Ackerley, of the third part, after reciting the facts, and that the said Ellen Ollerton was the testator's heiress-at-law, and that the said John Ollerton and Ellen, his wife, were indebted to the said John Lord and William Ackerley for money lent, it was witnessed that the said John Ollerton and Ellen his wife, in consideration of the money so lent, and of 10s. paid to them by J. C., the said Ellen Ollerton joining therein, as well to release and convey the said hereditaments firstly and secondly thereafter described, as to release and extinguish every right and title to dower which she might have with or out of the said hereditaments and premises thirdly thereafter described, and to the intent that the then reciting indenture might operate and take effect by force or under the act for rendering a release as effectual for the conveyance of freehold estates as a lease and release

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by the same parties, did grant, bargain, and sell, release and convey to the said J. C. and his heirs — firstly, those two dwelling-houses and premises by the said will devised to the said Ellen Fleming, now Ollerton; and, secondly, all those three dwelling-houses and premises by the said will devised to Ellen Bancks, and all other lands, &c., which the said Ellen Ollerton was entitled to as heiress at law of the said testator, subject as to the premises secondly described, to the life estate of the said Ellen Bancks, to the said J. C. and his heirs, to the use of the said John Lord and William Ackerley, for 1000 years upon certain trusts, and after that term to such uses as John Ollerton and Ellen his wife should by deed in writing appoint, and in default of any such appointment to the use of the survivor of them as he or she might appoint by deed or direct by will, and in the mean time to the use of John Ollerton and Ellen his wife during their joint lives, and the survivor of them, their heirs and assigns; and it was in the said indenture declared that the said term of 1000 years was so limited to the said John Lord and William Ackerley for the purpose of securing the repayment of the said loan with interest. Ellen Ollerton died without having joined with her husband in making any appointment under this settlement: —

Held, that the circumstance of the remainder devolving on Ellen Ollerton as heiress-at-law, at the same time that her life estate took effect under the will by the death of the testator, did not operate as a merger of the life estate so as to bar the contingent remainder; but held also, that the above deed, if duly executed by Ellen Ollerton, so as to pass her interest in possession and reversion, operated to destroy the contingent remainder; for the union of the two estates was necessary to raise the uses limited by the deed, and the life estate was therefore merged in the reversion in fee.

This indenture was prepared by John Lord and William Ackerley, who were the only solicitors employed in the transaction, and was executed by John Ollerton and Ellen his wife, and was acknowledged by the latter before the said John Lord, one of the mortgagees of the said indenture, and one E. Woodcock, perpetual commissioner for taking the acknowledgments of married women, the said E. Woodcock not being in any manner interested in the transaction giving occasion for the said acknowledgment or concerned therein as attorney, solicitor, or agent, or as clerk to any attorney, solicitor, or agent so interested, or concerned, and a certificate in the form pointed out by the 3 & 4 Will. 4, c. 4, s. 84, was signed and filed of record, with an affidavit in the usual form: —

Held, that the certificate having been filed of record, and being on the face of it correct, it must be taken to be valid until set aside by the Court of Common Pleas: —

Seemle, that the acknowledgment was invalid, one of the commissioners having been an interested party; and, *seemle*, that the invalidity of the certificate might have been set up had it appeared on the face of the certificate and deed that the party to whom the conveyance was made was one of the commissioners.

THIS was an action of ejectment, to recover possession of a dwelling-house and premises, at Hindley, in Lancashire.

At the trial, before Martin, B., at the Liverpool Spring Assizes, 1853, a verdict was taken for the plaintiff, subject to the opinion of this court, on a special case.

The case stated, that on the 8th of February, 1788, Richard Bancks, being seised in fee of the property in question, made his will, whereby, after charging his realty and personalty with the payment of his debts and funeral expenses, he gave and devised to Elizabeth (his wife) five dwelling-houses, in Hindley, for her natural life, and from and immediately after her death, he gave and devised two of the said dwelling-houses to Ellen, the wife of Greaves Fleming, his daughter, for her separate use, with power to dispose of the same at her death, amongst her children, which should be living at the time of her death, and after the death of his said wife Elizabeth, he gave the three remaining houses, &c., to Ellen, the daughter of Ann Bancks, his late daughter, deceased, for her sole use, with power to dispose of the same to and among her lawful issue, her surviving, and their heirs forever, as she should think fit. And if it did happen that his wife should die before his said granddaughter Ellen should have

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attained twenty-one years, the testator's will was, that the rents of the said last-mentioned dwelling-houses should go towards the education and maintenance of the said Ellen; and if either Ellen his daughter, or Ellen his granddaughter, should die without issue living at the time of their respective deaths, then his will was, that the survivor should have that which was thereinbefore given to the deceased party for her own use, subject to the limitation thereinbefore mentioned; and if both should die without issue them surviving, the testator gave all the property in equal shares amongst his brothers, sister, and others. The testator died in 1788, and Elizabeth Bancks, his wife, entered into possession of the five dwelling-houses, and enjoyed the same up to her death in 1810. In 1798, Ellen, then the widow of Greaves Fleming, intermarried with the defendant, and died in 1848, without issue. On the death of Elizabeth Bancks, the plaintiff and the defendant, in right of his wife, respectively entered into possession of their respective shares of the said hereditaments, and still hold possession of the same, respectively. By an indenture dated the 12th of May, 1843, and made between the defendant and his wife Ellen, of the first part, John Caldwell, of the second part, John Lord, and William Ackerley, of the third part, after reciting the said will of Richard Bancks, and his death, and that of his brother, his sister, and the other parties left in remainder, but that his granddaughter Ellen, was then alive, and had never been married; and also reciting the death of Greaves Fleming, and that his widow had married the said John Ollerton, and that the testator died, leaving one child only him surviving, namely, the said Ellen Ollerton, who was his heiress at law; and that the said John Ollerton was seised in fee simple of the property thirdly thereafter described; and that the said John Ollerton and Ellen his wife, were indebted to the said John Lord and William Ackerley, in 80*l.*, for money lent; and that the said John Lord and William Ackerley had requested some security, and that it had been agreed that the said hereditaments should be settled and assured in manner thereafter appearing.

It was witnessed that the said John Ollerton, and Ellen his wife, in consideration of 80*l.* lent to them by John Lord and William Ackerley, and of 10*s.* paid to them by John Caldwell, the said Ellen Ollerton joining therein, as well to release and convey the said hereditaments firstly and secondly thereafter described, as to release and extinguish every right and title to dower which she might have with or out of the said hereditaments and premises thirdly thereafter described, and to the intent that the then reciting indenture might operate and take effect by force, or under the act for rendering a release as effectual for the conveyance of freehold estates as a lease and release by the same parties, did grant, bargain, sell, release, and convey to the said John Caldwell, and his heirs — firstly, those two dwelling-houses and premises by the said will devised to the said Ellen Fleming, now Ollerton; and, secondly, all those three dwelling-houses and premises by the said will devised to Ellen Bancks, and all other lands, &c., which the said Ellen Ollerton was entitled to as heiress at law of the said testator; and, thirdly, certain

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premises belonging to the said John Ollerton, &c., to hold the same, subject as to the premises secondly described, to the life estate of the said Ellen Bancks, to the said John Caldwell and his heirs, to the use of the said John Lord and William Ackerley, for 1000 years, upon certain trusts, and after that term to such uses as John Ollerton and Ellen his wife should, by deed in writing, appoint, and in default of any such appointment, to the use of the survivor of them as he or she might appoint by deed or direct by will, and in the mean time to the use of John Ollerton and Ellen his wife, during their joint lives and the survivor of them, their heirs and assigns; and it was in the said indenture declared, that the said term of 1000 years was so limited to the said John Lord and William Ackerley, for the purpose of securing the repayment of the said sum of 80*l.*, with interest.

This indenture was prepared by John Lord and William Ackerley, who were the only solicitors employed in the transaction, and was executed by John Ollerton and Ellen his wife, and was acknowledged by the latter before the said John Lord, one of the mortgagees of the said indenture, and one E. Woodcock, perpetual commissioners for taking the acknowledgments of married women, the said E. Woodcock not being in any manner interested in the transaction giving occasion for the said acknowledgment, or concerned therein as attorney, solicitor, or agent, or as clerk to any attorney, solicitor, or agent so interested or concerned. And the said commissioners signed a certificate of their having taken such acknowledgment in the form pointed out by the 3 & 4 Will. 4, c. 74, s. 84; and such certificate, accompanied by the affidavit required for verifying the same, was subsequently filed, and is still of record, such affidavit being made by the said E. Woodcock, in the form pointed out by the Orders of the Court of Common Pleas, at Westminster, of Hilary term, 1834, as to the want of such interest or concern as aforesaid, in the transaction by the said E. Woodcock.

The testator had two children only, namely, the said Ellen Ollerton, and Ann Bancks, which latter died in his lifetime, and unmarried. The plaintiff was her illegitimate and only child. The said Ellen Ollerton was the sole heiress at law of the testator, and she died without having joined with her husband in making any appointment of the property limited by the said settlement.

The action was brought to recover part of the premises devised by the testator's will, to Ellen, wife of the defendant, John Ollerton. The questions for the opinion of the court were, first, whether, by the said will, an estate in such last-mentioned premises sufficient to maintain the present action was given to the plaintiff on the death, without issue, of the said Ellen Ollerton? and, secondly, if so, did the deed of the 12th of May, 1843, executed and acknowledged as aforesaid, defeat such estate? If the court should be of opinion that such an estate was given by the said will to the plaintiff on the death, without issue, of the said Ellen Ollerton, and that such estate was not defeated by the said deed of the 12th of May, 1843, the verdict for the plaintiff was to stand. But if the court should be of opinion that no such estate was given, or that the estate given was

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defeated as aforesaid, the verdict was to be set aside, and a nonsuit to be entered in lieu thereof.

Knowles, for the plaintiff.¹ The effect of the will as to the property now in question was to limit the property to the testator's widow for life, remainder to Mrs. Fleming (afterwards Ollerton) for life, remainder (subject to a power of appointment in favor of children) to her children, if any, living at her death, in fee; if no child, then to Mrs. Banks for life, if she survived Mrs. Ollerton. The ultimate reversion is not disposed of at all, and this, on the death of the testator, would descend to Mrs. Ollerton as heiress at law. On the death of the widow, Mrs. Ollerton became tenant for life in possession, and unless her life estate merged in the estate of inheritance, the contingent remainder to the plaintiff would take effect on the death of Mrs. Ollerton, independently of the effect of the deed of May, 1843. Now, the remainder devolving on Mrs. Ollerton as heiress at law at the same time as her life estate under the will of the testator took effect, did not operate as a merger, for the descent of the inheritance was immediate from the person by whose will the particular estate and the contingent remainders were limited. *Plunket v. Holmes*, 1 Lev. 11, *Fearne's Contingent Remainders*, 343. Then, was the contingent remainder destroyed by the deed of May, 1843? It is submitted it was not, for two reasons: first, because the deed was inoperative, because not properly acknowledged, Mr. Lord being one of the mortgagees, and therefore incompetent to take the acknowledgment of Mrs. Lord, under, the 3 & 4 Will. 4, c. 74, s. 77. It is contrary to the principles of justice and public policy that any party who is interested should perform any judicial function. *The Grand Junction Canal Company v. Dimes*, 3 H. L. Cas. 797. A commissioner for this purpose is a judicial officer, and the acknowledgment taken before him, if an interested party, is void. *Wilson on Fines*, 22, 35. If this broad line is not drawn, the wife's husband might act as one of the commissioners. It will be said that the rules made by the Court of Common Pleas, in Hilary term, 1834, under section 89, have been complied with, because one of the commissioners was disinterested. The rule is: "And it is hereby further ordered, that where any acknowledgment shall be made by any married woman, of any deed, under or by virtue of the said act, before commissioners appointed under the said act, one at least of the said commissioners shall be a person who is not in any manner interested in the transaction giving occasion for such acknowledgment, or concerned therein as attorney, solicitor, or agent, or as clerk to any attorney, solicitor, or agent so interested or concerned." The words of the rule are ambiguous, and may refer only to persons interested or concerned as solicitor, &c. But even if the court had authority to make rules of this nature under the 89th section, which refers to "the mode of examination to be pursued by the commissioners," they had no

¹ May 7, before POLLOCK, C. B., PARKE, B., PLATT, B., and MARTIN, B.

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power to make a rule which should be opposed to one of the fundamental principles of law and justice. A certificate when enrolled gives validity to the deed from the time of its being acknowledged, s. 86, but this cannot mean a certificate which is void altogether. If the deed should not be held to be bad altogether, still, it did not operate to destroy the contingent remainder of Ellen Bancks. The general rule as laid down by Fearn, 339, is, that where the union of the particular estate and the inheritance happens by conveyance or act of the parties, the intermediate contingent remainders dependent on the particular estate are destroyed. But this rule refers to cases where the particular estate and the inheritance are in the hands of different parties, and by their concurrence the lesser estate is merged in the greater, but here the life estate was kept alive separately from the reversion, and the grantee may well take the grantor's estate subject to the same incidents and qualities it had in the hands of the grantor. The policy of the law is to prevent the destruction of contingent remainders. 8 & 9 Vict. c. 106. There is no case where such a conveyance as this has been held to destroy the contingent remainder. It is further contended that the deed did not carry the inheritance so as to cause a merger of the life estate. It is a release to uses, and the uses are first for Lord and Ackerley for the term, then to such uses as Ollerton and his wife should, jointly, appoint, and, in default of such joint appointment, to such uses as the survivor should appoint, and in default of appointment, (and none was made,) to the use of Ollerton and his wife for their joint lives, with remainder to the use of the survivor, his or her heirs, forever. The only limitation in fee is to Ollerton and his wife for their joint lives. The remainder in fee to the survivor, is contingent only until the contingency happens, and then the use results to Mrs. Ollerton, who is in-of her old estate, so that there is no union of her life estate and the inheritance. The effect, therefore, is, that there is no merger in the reversion.

Lee, (Atherton with him,) contra. The objection as to the acknowledgment is of great importance, because it would be most mischievous to allow any inquiry of this kind to affect the validity of an acknowledgment once duly certified and filed of record. Every title in the country might be put in jeopardy. The rules made by the Court of Common Pleas are in accordance with the statute, and have been in operation for twenty years; and in this instance they have been literally complied with. The certificate once filed becomes a record, and imports absolute verity.

[MARTIN, B. Suppose the name of the commissioner to have been forged, could it not be shown to be a forgery?]

It would in that case not be an acknowledgment; but even then it should first be taken off the file. It is like the case of a purveyor to a forged will; it is conclusive until the forgery is proved. *Allen v. Dundas*, 3 Term Rep. 125. Then, what was the effect of the deed? It may be conceded that the contingent remainder was not destroyed otherwise than by the deed; but the point now made, that because

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both estates are in the same person before the conveyance, there is no merger, is quite untenable. The deed is subsequent to the devise, and that creates the merger. The two estates, namely, the life estate and the reversion, were essential to support the uses in the deed; and when Mrs. Ollerton conveyed all her interest, whether in possession or reversion, although it was to a releasee to uses, the unavoidable effect was a merger. The particular estate being once merged, the contingent remainder is wholly destroyed, though the particular estate should be revived again. He referred to *Purefoy v. Rogers*, 2 Wms. Saund. 380, and *Plunket v. Holmes*.

Knowles, in reply. The case of a probate of a forged will is not analogous, for the title to personalty depends exclusively on the probate, and the ecclesiastical court is the only jurisdiction to decide upon its validity. If, however, a probate was granted of a supposed will of a man who was still alive, the probate would be altogether void, for the court would have had no jurisdiction to grant it. That is the same with the certificate in this case, and the estate must pass by the deed and acknowledgment, and cannot fluctuate according to whether the certificate is on or off the file.

Cur. adv. vult.

Judgment was now delivered by

POLLOCK, C. B. This was an action of ejectment to recover possession of a dwelling-house, tenement, outbuildings, yard, and garden, with the appurtenances, situate in the township of Hindley, in the parish of Wigram, in the county of Lancaster, to the possession whereof the plaintiff claimed to have been on and since the 1st of January, 1852, entitled, and to eject all other persons therefrom. The defendant defended for the whole of the said premises. The cause came on to be tried before my brother Martin, at the Liverpool Spring Assizes, for 1853, when a verdict by consent was taken for the plaintiff, subject to the opinion of the court upon a case. The case raises a point upon which I am to pronounce the judgment of the court. That point is: did a certain deed made on the 12th of May, 1843, executed and acknowledged by a married woman, defeat an estate? and the question on which that turns is, whether the proceedings which were had for the purpose of executing a deed by a married woman were such as would be operative and valid notwithstanding the want of authority of one of the persons employed as commissioners to examine the married woman, and to attest her execution. The only real question in this case is, whether the contingent remainder which the plaintiff certainly had under the will of Richard Banks, if Ellen Fleming, afterwards Ollerton, should die without leaving lawful issue living at her death, was barred by the indenture of the 12th of May, 1843, executed by Ellen Ollerton, who was the heiress at law of the testator.

It was conceded by the defendant's counsel that the circumstance of the remainder devolving on Ellen Ollerton as heiress at law at the

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same time that her life estate took effect under the will by the death of the testator, did not operate as a merger of the life estate so as to bar the contingent remainder; but it was contended by him, and we have no doubt properly, that if the deed was duly executed by Ellen Ollerton, so as to pass her interest in possession and reversion, its operation was to destroy the contingent remainder, for the union of the two estates was necessary to raise the uses limited by the deed, and the life estate was, therefore, merged in the reversion in fee. The only question, therefore, is, whether the deed was duly executed and the proper steps taken to pass the interest of a *feme covert*. In order to effect this object it was necessary, by the 79th section of the statute 3 & 4 Will. 4, c. 74, the act for the abolition of fines and recoveries, and for the substitution of more simple modes of assurance, that the deed upon its execution, or afterwards, shall be produced and acknowledged by her as her act and deed before a judge of one of the superior courts at Westminster, or a master in chancery, or before two of the perpetual commissioners, or two special commissioners; and by section 80 the judge, the master in chancery, or the commissioners, before they receive the acknowledgment, shall examine the married woman apart from her husband touching her knowledge of such deed, and shall ascertain whether she freely and voluntarily consents to such deed, and, unless she does so, shall not permit her to acknowledge it, and the deed, as to the married woman, is void. The deed in question was acknowledged before two perpetual commissioners, one of whom was Mr. Lord, the mortgagee, and he and his partners were the only solicitors employed in the transaction. If there had been no other provision in the statute, this acknowledgment would not have been valid, for a commissioner could not act in his own case any more than a judge. The statute requiring two commissioners obviously means that they both should be commissioners within the meaning of the act. But then a question was made, whether the rules of the Court of Common Pleas, made in pursuance of the 89th section, did not obviate this objection. That section provides that the Court of Common Pleas shall make such orders and regulations as the court shall think fit, touching the mode of examination to be pursued by the commissioners to be appointed under that act, and other matters. Pursuant to this power the Court of Common Pleas made general rules in Michaelmas term, 1833, and again in Hilary term, 1834, by which it was said to be provided that one of the commissioners might be a person interested. We think this rule was not meant to apply to any but those who are interested as attorneys for the parties. If it did apply to a party, we think the rule to that extent is void, as being beyond the power given to that court by the statute. This would be, in effect, an alteration of the statute itself. The authority given by the 89th section clearly extends the mode of proceeding only. But we need not decide this point, as we think that all question on the trial of the ejectment as to the validity of the conveyance is precluded by the certificate required by the 85th section, so long as that remains of record.

That 85th section directs that there shall be a memorandum in-

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dorsed or written on the deed signed by the judge or commissioner, who took the acknowledgement, and also a certificate of the taking of such acknowledgment, written or engrossed on a separate piece of parchment, in the form which the act provides for that purpose, and signed by the same judge or commissioner, and in that certificate the full age of the *feme covert*, her competence and separate examination and consent are all to be stated; and by the 85th section this certificate, with an affidavit verifying the signatures, is to be deposited with an officer of the Common Pleas, who is to examine it, and if all the requisites have been complied with, the officer is to cause the certificate and affidavit to be filed of record in the Court of Common Pleas. Then the 85th section provides that when the certificate, &c., is filed of record, the deed and acknowledgment shall, so far as regards the disposition, release, surrender, or extinguishment thereby made by any married woman whose acknowledgment shall be so certified concerning any lands, take effect from the time of its being acknowledged, and the subsequent filing of such certificate as aforesaid shall have relation to such acknowledgment. The certificate is an essential part of the title of a person claiming under a deed, and until it is filed of record no title passes, as was decided by this court in the case of *Jolly v. Handcock*, 7 Exch. Rep. 820; s. c. 16 Eng. Rep. 472. When it is filed, the deed operates from the time of the acknowledgment. The 88th section enacts, that after the filing of the certificate, the officer shall deliver at any time copies of the certificate signed by him, and every such copy shall be received as evidence of the acknowledgment of the deed to which it refers. It is clear from that clause that no other evidence is necessary to prove the acknowledgment of the *feme covert* than a signed copy of the certificate, or the certificate itself. But we think that the legislature must have intended that it should not only be evidence, and sufficient evidence, but also conclusive evidence of the acknowledgment. By requiring the affidavit to be filed of record, it must be inferred that it was intended that it should have the property of a record and be conclusive evidence of the fact stated, more especially when it is considered that it is a substitute for a chirograph of the fine, which was conclusive evidence of the acknowledgment. And it is of the greatest importance to the security of titles to real estates that it should not be a question for the jury, whenever the title under the deed comes into question, whether a judicial inquiry was properly instituted before proper persons, and properly conducted. The mischief would be enormous if such inquiries before the jury were permitted, and we cannot doubt that it was the purpose of the legislature to prevent them by the enactment to which we have referred. If the certificate is not warranted by the act, and ought not to have been given, the remedy is by an application by the party aggrieved to the court of Common Pleas, to quash the certificate and take it off the file, as having been improperly or irregularly made. That court will exercise its discretion in granting or refusing the application according to the circumstances under which it is made, the nature of the interest affected, the length of the acquiescence of the party com-

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plaining, and all other material matter, and no doubt they will then render the party complete justice. If the defect appeared on the face of the certificate itself, compared with the deed, as, for instance, if it appeared by that comparison that the party to whom the conveyance was made was one of the commissioners, it may be that the objection, as to the invalidity of the certificate, might be taken on a trial at law where the title was in question. But that is not the present case, for the identity of John Lord, the commissioner, and John Lord, the mortgagee, does not appear on the face of the certificate.

The certificate is, therefore, on the face of it unobjectionable, and, until it is set aside by the Court of Common Pleas, must be considered as operative and as conclusive evidence of the facts. The defendant is, therefore, entitled to our judgment.

Judgment for the defendant.¹

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June 13, 1854.

Local Paving Rate — District Church — Public Building.

A local act, (50 Geo. 3, c. 149, St. Luke's, Middlesex, Paving Act,) empowered the vestry men or trustees to assess towards any paving rate "the parish church, parochial and other chapels, meeting-houses, places for religious worship, hospitals, public schools, and other public buildings within the said parish which now are or hereafter may be built;" the assessments for the said parish church to be paid by the church-wardens or chapel wardens for the time being, . . . "and the persons having the care or conduct for the time being of such other public buildings." The 57 Geo. 3, c. 29, (the Middlesex Paving Act,) empowered "the trustees having the control of the pavements in any parochial or other district within the jurisdiction of the act to rate any cathedral, collegiate, or other church or churches, parochial or other chapel, meeting-houses, places for religious worship, hospitals, public schools, and all other public buildings within each of such parochial or other districts which now is or hereafter may be built, and all other places which by any local act or acts of parliament, relating to any parochial or other district, may be or are or is liable to be rated," in certain specified proportions, and enacted that the rates "of and for any church or parochial chapel are to be paid by the church-wardens or chapel wardens respectively for the time being, and the rates for any other public buildings by the house-keeper or other person or persons having the care of such other public buildings for the time being," &c. St. Matthew's Church was duly made a district church of St. Luke's parish under the 6 & 7 Vict. c. 37, under which act church-wardens are elected annually, but they are not overseers in respect of their office as church-wardens. The trustees acting under the 57 Geo. 3, c. 29, made a paving rate, and rated the district church of St. Matthew, and claimed the amount from the church-wardens for the time being. No pew-rents were payable in respect of the pews in the church, nor had the church-wardens any funds out of which to pay the rates:—

Held, that the district church was liable to be rated, and that the church-wardens were bound to pay the rate.

¹ See now 17 & 18 Vict. c. 75, entitled, "An act to remove doubts concerning the due acknowledgment of deeds by married women in certain cases."

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THIS was an action to recover 16*l.* 7*s.* 9*d.* for a paving rate charged upon St. Matthew's Church, City Road.

A special case was stated, without pleadings, and the following are the material parts of the case:—

The plaintiff is clerk to the trustees appointed under 54 Geo. 3 c. 149, intituled 'An act for making more effectual provision for lighting, watching, paving, cleansing, regulating, and improving the streets and other public places in the parish of St. Luke, in the county of Middlesex.' The defendants were at the time of making the after-mentioned rate the church-wardens of St. Matthew's Church, City Road, a church erected under the provisions of the 6 & 7 Vict. c. 37, providing for the spiritual care of populous parishes, having a district called the "New Parish of St. Matthew." The church is situate wholly within the parish of St. Luke. The 25th section of the 50 Geo. 3, c. 149, enacts, "That the vestrymen of the said parish pursuant to this act shall, on Thursday next after the 24th day of June in every year, meet together, and shall settle, ascertain, and estimate the respective sums of money necessary to be raised by a just and equal pound rate for the payment and discharge of all the expenses for lighting, cleansing, and watching the streets, squares, lanes, alleys, courts, yards, and open passages, ways, and places within the said parish," and for other expenses chargeable on the rates. The 100th section recites that, "It is reasonable that all public buildings and all dead walls and void spaces of ground should be rated towards the purposes of such part of this act as relates to the paving and repairing of the pavement in the said parish;" and enacts, "That it shall and may be lawful to and for the vestrymen or trustees in any rate or assessment to be made for paving or repairing the pavement of and within the said parish, from time to time to rate and assess towards the said purposes of this act, the parish church, parochial and other chapels, meeting-houses, places for religious worship, hospitals, public schools, and other public buildings within the said parish which now is or hereafter may be built, at a rate not exceeding 1*s.* per square yard in any one year of the pavement paved or repaired under the direction of the said trustees, situate, lying, and being in any such square, street, or place," &c. It then provides: "And the rate or rates, assessment or assessments to be made and paid for such parish church, parochial and other chapels, meeting-houses, places for religious worship, hospitals, public schools, and other public buildings, &c., shall be paid by the church-wardens or chapel-wardens for the time being of such churches or chapels, the deacons, ministers, teachers or preachers of such meeting-houses for the time being, the stewards or housekeepers for the time being of such hospitals, the masters or mistresses for the time being of such schools, and the persons having the care or conduct for the time being of such other public buildings as aforesaid, &c., shall respectively be charged with and shall pay such sums of money as shall from time to time be rated, assessed, or imposed on the said premises, and which may be recovered and applied in such manner

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as other rates and assessments are directed to be recovered and applied by this act."

By the 30th section of the 57 Geo. 3, c. 29, intituled "An act for the better paving, improving, and regulating the streets of the metropolis, and removing and preventing nuisances and obstructions therein," it is enacted: "That it may be lawful to and for the commissioners, trustees, and other persons having the control of the pavements of the streets or public places in any parochial or other district within the jurisdiction of this act, to include in any rate or assessment for or towards the costs and charges of paving or repairing the pavement of and within such parochial or other district, either jointly or separately, with any other objects or purposes to be hereafter made by virtue of the respective local act or acts relating to the pavements of such parochial or other district, or to such pavements and other objects, or by virtue of this act, and from time to time to rate and assess thereby any cathedral, collegiate or other church or churches, parochial or other chapels, meeting-houses, places for religious worship, hospitals, public schools, and all other public buildings, within each of such parochial or other districts, which now is or hereafter may be built, and all other place or places which, by any local act or acts of parliament relating to any particular parochial or other district, may be, or are or is liable to be rated or assessed for those purposes, or any of them, at a rate not exceeding in any one year the sum of," &c., (specifying the amount of the rate for different localities;) "and that every of the said rates or assessments so made from time to time shall be paid for such cathedral, collegiate or other churches, parochial and other chapels, meeting-houses, places for public worship, hospitals, public schools, and other public buildings, churchyards, cemeteries or other burying-places, dead walls, and void spaces of ground, by the persons following, that is to say, the rates and assessments of and for any cathedral or collegiate church, by the dean and chapter thereof; and of and for any other churches or parochial chapels and churchyards and parochial cemeteries, by the church-wardens or chapel-wardens thereof respectively for the time being; and the rates or assessments of or for any hospitals, by the stewards or housekeepers of such hospitals for the time being; and the rates and assessments of or for any public schools, by the master or mistresses of such public schools for the time being; and the rates or assessments of and for any session-houses or gaols, or courts of justice, by the clerk or clerks of the peace for the city, borough, or county, for the time being; and the rates and assessments of and for any public buildings, by the housekeeper or other keepers, or other person or persons having the care of such other public buildings as aforesaid for the time being," &c.

By the 17th section of the 6 & 7 Vict. c. 37, it is enacted: "That in every such case of a district so becoming a new parish, two fit and proper persons, being members of the united church of England and Ireland, shall, within twenty-one days from the consecration of the church thereof, be chosen church-wardens for such new parish, one being chosen by the perpetual curate thereof, and the other by

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the inhabitants residing therein, and having a similar qualification to that which would entitle inhabitants to vote at the election of church-wardens for the principal parish as aforesaid, or the majority of such inhabitants, and such election shall take place at a meeting to be summoned in such manner in all respects as such perpetual curate shall direct; and such persons shall continue such church-wardens until the next usual period of appointing parish officers following their appointment; and at the like time in every year such persons shall thenceforward be chosen by the perpetual curate for the time being and the inhabitants assembled as aforesaid; and every person so chosen as aforesaid shall be duly admitted, and shall do all things pertaining to the office of church-warden as to ecclesiastical matters in the said new parish; provided always, that nothing herein contained shall render any such church-wardens liable or competent to perform the duties of overseers of the poor in respect of such their office of church-wardens."

The defendants were appointed church-wardens of the said church of St. Matthew, under the provisions of the last-mentioned act. No pew-rents have ever been payable in respect of the pews of the said church, and the church-wardens have never had any funds out of which payments can be made.

The said church was completed and opened for the celebration of divine service in April, 1847, and from that time until 1849, the trustees, acting under the said statutes, have, from time to time, rated the same church, for the purpose of paving and repairing the pavements of the parish of St. Luke; and four quarters' rates, ending Midsummer, 1849, have been paid by the church-wardens of St. Matthew, for the time being, out of their own pockets, and were subsequently repaid to them by voluntary contributions of members of the congregation. Afterwards a rate was, in conformity with the provisions of the said act, made for repairing the pavements of the said parish, and by the said rate the said church of St. Matthew was assessed, and the claim now made is for 16*l.* 7*s.* 9*d.* for arrears of such paving rate up to Midsummer day, 1850. The question for the opinion of the court was, whether the said rate was payable in respect of the said church.

Willes, for the plaintiffs.¹ This question is already decided by the decision in *Hopkinson v. Puncher*, 3 Exch. Rep. 95, under the Westminster Paving Act, 9 Geo. 4, c. 64, which contained an enactment similar to the 57 Geo. 3, c. 29, s. 30. The court then called on

Lush, to distinguish that case. This church is a district church, under the 6 & 7 Vict. c. 37, and the church-wardens have no power to raise money by letting the pews, making rates, or by any other way; they are church-wardens solely for ecclesiastical purposes. In *Hopkinson v. Puncher*, the court intimated that the church-wardens might reimburse themselves by a rate, but *Gosling v. Veley*, 12 Q. B.

¹ July 31, before POLLOCK, C. B., ALDERSON, B., PLATT, B., and MARTIN, B.

Mills v. Rydon.

Rep. 328, was not then decided, and, certainly, in the present case this could not be done. The 57 Geo. 3, c. 29, does not extend the area of rating, which is to be the same as under the former act, and at that time there was no such class of building as a district church.

[MARTIN, B. Is not this a public building?]

These church-wardens are not the persons having the care of it in the sense meant by the act. It is a *casus omissus*.

Willes, in reply. Although not overseers of the poor, these church-wardens have the care of the fabric. *Burn's Eccl. Law*, p. 399. If the building be not within the meaning of the word "church" or "chapel," it is a public building. There is no provision to exempt these church-wardens, and whether they can reimburse themselves or not is wholly immaterial. *Hopkinson v. Puncher* was not decided upon the ground of the church-wardens having that power.

Cur. adv. vult.

Judgment was now delivered by

POLLOCK, C. B. In this case the question for the opinion of the court was, whether a certain rate was payable in respect of a church. It turns out that the church was a district church, created under the 6 & 7 Vict. c. 37, which provided that the district should become a new parish upon the church being consecrated, and the 17th section says: "That in every such case of a district so becoming a new parish, two fit and proper persons, being members of the Church of England, shall, within twenty-one days, be chosen church-wardens of such new parish; one being chosen by the perpetual curate thereof, and the other by the inhabitants residing therein; and such persons shall continue such church-wardens until the next usual period for appointing two such officers." And it provides in the latter part "that every person so chosen as aforesaid shall be duly admitted, and shall do all things pertaining to the office of church-warden as to ecclesiastical matters in the said new parish." [His lordship then referred to the 25th, 27th, and 100th sections of the 50 Geo. 3, c. 149, and proceeded:] Now, in the case of *Hopkinson v. Puncher*, it was decided under the 33d section of the 9 Geo. 4, c. 64, (an act for more effectually lighting and paving certain parts of Westminster,) by which section the commissioners were empowered to make rates in respect of any cathedral, church, chapel, &c., and the rates to be levied in respect of any church were to be paid by the church-wardens, that they were personally liable to the commissioners for the rates, and the want of parochial funds did not exempt them from that liability. In that case it was thrown out, that very probably there might by implication be a right to levy, by means of a rate, that which would indemnify the church-wardens for what they were called upon to pay by the act of parliament; but whether that be so or not, whether the act of parliament, by necessary implication, gives them that power or not, we are of opinion that the church-wardens being pointed out as the persons who are to pay, and the church being clearly within the provisions of

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the act, it makes the church liable to be rated. The question, and the only question put in the case, and I believe the only question that the counsel were desirous of arguing, was, whether the said rate is payable in respect of the said church. We are all of opinion that it is payable in respect of the said church. We are further of opinion that it is payable by the church-wardens. The judgment of the court will, therefore, be in favor of the plaintiff.

Judgment for the plaintiff.

MOORE v. CAMPBELL.

July 7, 1854.

Contract — Bought and Sold Notes — Variance — Evidence of Usage of Trade — Alteration of Contract.

A broker, acting for the plaintiff, verbally contracted to buy certain hemp of the defendant, and sent him a note stating the terms, commencing thus: "Sold for Mr. C. (the defendant,) to Mr. M. (the plaintiff)" The defendant sent back another note, commencing: "I have this day sold through you to Mr. M.," &c. The terms of the sale, as stated in the two notes, varied materially. In an action against the defendant for non-delivery, treating the note signed by him as the contract: —

Held, that the liability of the defendant depended upon the question of fact, whether the note signed by him was intended by both parties to be the contract, in which case he would be liable; or whether the defendant only intended to be bound as the seller, provided the plaintiff should also sign a note to bind himself as buyer.

Under a contract to sell and deliver goods in a warehouse in Liverpool, the giving a delivery order of "about" the quantity is a sufficient delivery, evidence of a known usage of warehouse-keepers not accepting delivery orders in any other form being admissible.

Under a contract, which was required by the Statute of Frauds to be in writing, goods were sold, to arrive by a certain ship to be taken from the quay. The purchaser afterwards verbally consented to the goods being warehoused instead of being delivered from the quay: —

Held, in an action for non-delivery of the goods, that such consent did not support a plea of rescission of the contract.

THE declaration stated that the defendant made an agreement with the plaintiff to sell him fifty tons of Petersburg clean hemp, expected to arrive at Liverpool by the ship George Green, at the price of 34*l.* per ton from the quay, and on the terms, that if the ship should be lost, or the hemp damaged on the voyage, the contract should be considered void for such quantity as might be lost or damaged; the quality to be of fair average of the season; and if any dispute should arise, the same should be settled by arbitration: payment to be made by the plaintiff by six months' acceptance, or cash in fourteen days, less 2½ per cent. discount, at the buyer's option, and on the terms of customary allowances. Averments, that the ship arrived at Liverpool with fifty tons of hemp not damaged; that the plaintiff was ready to

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accept the same, and to exercise his option, and pay for the same by a six months' acceptance; performance of conditions precedent, and that a reasonable time for the delivery of the hemp had expired, &c. Breach, non-delivery of the fifty tons of hemp to the plaintiff from the quay or elsewhere.

Pleas: first, a denial of the agreement; thirdly, that within a reasonable time for the delivery and acceptance of the said quantity of fifty tons of hemp, the defendant was ready and willing, and offered to deliver to the plaintiff the said hemp, but he refused to accept the said hemp from the defendant; fourthly, that, after the making of the agreement, and before any breach, the agreement was mutually rescinded by the plaintiff and the defendant. Issues thereon.

At the trial, before Platt, B., at the last Liverpool Spring Assizes, it appeared that Mr. Wilks, a broker, was employed by the plaintiff to purchase hemp, and effected a contract with the defendant, to whom he signed and sent the following note:—

“Liverpool, September 8, 1853.

“Sold for Mr. Campbell to Mr. Moore, fifty tons of Petersburg clean hemp, *ex* George Green, to arrive, at 34*l.* per ton; payment, at the option of the buyer, by acceptance on London at six months from delivery, or cash in fourteen days, less 2½ per cent.; to be taken from the quay at the landing weights, and to be of fair average quality of the season.”

The defendant sent the following in reply:—

“Liverpool, September 8, 1853.

“I have this day sold through you, to Mr. Moore, fifty tons Petersburg clean hemp, expected to arrive per George Green, at 34*l.* per ton from the quay. If the ship is lost, or the hemp damaged on the voyage, this contract to be considered void for such quantity as may be lost or damaged. The quality to be of fair average of the season, and if any dispute arises, the same to be settled by arbitration. Payment, six months' acceptance, or cash in fourteen days, less 2½ per cent. discount, at the buyer's option. Customary allowances.”

On the arrival of the *George Green*, the fifty tons of hemp were warehoused, but the evidence was contradictory as to whether the plaintiff consented to the warehousing. He, subsequently, declared his option to pay by six months' bill, and the defendant then tendered to him two delivery orders from the warehouse, for “about” thirty tons, and “about” twenty tons of hemp, respectively. The plaintiff refused to receive these orders without a guarantee that the quantities amounted to fifty tons, which the defendant declined to give.

It was objected, for the defendant, that, as the two notes differed, there was no contract, according to *Sivewright v. Archibald*, 17 Q. B. Rep. 103; s. c. 6 Eng. Rep. 286; but the objection was overruled. It was then proposed to give evidence that it was the usage of trade

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at Liverpool to insert the word "about" in delivery orders, and it was contended that, as the plaintiff had assented to the goods being warehoused, such evidence would show that the goods had been offered to the plaintiff and refused. This evidence the learned judge rejected, and ruled that none of the pleas were proved, reserving liberty to the defendant to move, and the jury found for the plaintiff, damages 125*l*.

A rule *nisi* was subsequently obtained to set aside the verdict for the plaintiff on the first issue, and to enter it for the defendant; or for a new trial, against which

Knowles and *Aspland* showed cause.¹ The rule to enter the verdict for the defendant was granted upon the supposition that these were bought and sold notes, in which case it is admitted the variances would be fatal; but they are both, in fact, sold notes, and that signed by the defendant is a binding contract. Wilks did not make the bargain as broker, but was employed as agent for the plaintiff, and the substance of the transaction is, that the defendant having received the sold note, makes some alterations in it, and sends in answer the letter signed by himself as the contract, which is, therefore, conclusive evidence against him. *Rowe v. Osborne*, 1 Stark. 140; and *Cowie v. Remfry*, 5 Moo. P. C. 232.

[ALDERSON, B. It seems a question of fact whether it was an offer or a contract, and that the jury have not decided.]

With respect to the rejection of the evidence, the contract was to deliver fifty tons, and delivery orders for "about" fifty do not fulfil that contract. The contract was certain and definite, and the evidence would make it uncertain, and was, therefore, inadmissible. *Powell v. Edmunds*, 12 East, 6; and *Blackett v. The Royal Exchange Assurance Company*, 2 Cr. & J. 244. The contract was not rescinded, for even assuming that the plaintiff had consented to the goods being warehoused, that consent would not make a new agreement, because it was not in writing. *Goss v. Lord Nugent*, 5 B. & Ad. 58; *Harvey v. Grabham*, 5 Ad. & E. 61; and *Stead v. Dawber*, 10 Ibid. 57. The substituted agreement was not performed, as in *Smith v. Trowsdale*, 23 Law J. Rep. (N. S.) Q. B. 107; s. c. 22 Eng. Rep. 360.

Hill and *Henderson*, in support of the rule. The effect of the assent to the goods being warehoused was a rescission of the first contract, for they could no longer be delivered from the quay. The question is, not whether the defendant could maintain an action upon the substituted contract, but whether the fourth plea is proved. The distinction between the existence of the contract, and the remedy upon it, is pointed out in the judgment of Lord Denman, C. J., in *Stead v. Dawber*: "It was urged, by the plaintiff's counsel, that the defendant's argument reduced him to an inconsistency; that he alleged, on the one hand, an alteration of the contract by parol, and yet, on the

¹ June 21, before PARKE, B., ALDERSON, B., and PLATT, B.

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other, asserted that such alteration by parol could not be made. But this is, in truth, to confound the contract with the remedy upon it. Independently of this statute, there is nothing to prevent the total waiver, or the partial alteration, of a written contract not under seal by parol agreement; and, in contemplation of law, such a contract so altered subsists between these parties, but the statute intervenes, and, in the case of such a contract, takes away the remedy by action." The evidence was admissible, because the agreement to warehouse implied, that the goods should be delivered out of the warehouse, in the ordinary and usual manner of delivery at Liverpool.

Cur. adv. vult.

Judgment was now delivered by

PARKE, B. In this case, my brother Platt reserved the question at the trial for the consideration of the court, as to the effect of two notes put in on the part of the plaintiff, in order to prove the contract alleged in the declaration, and the two notes differed in several material points. If this were a case in which the plaintiff sought to prove a contract by means of bought and sold notes, made by a broker for both parties, he must have failed, for the two notes disagree, and there would have been no valid contract. This, however, is not the case of a contract entered into by a broker for the buyer and the seller; Wilks, who made the contract, was indeed a broker, but he acted solely for the plaintiff. The plaintiff then insists that the note, signed by the defendant, is the contract, and the declaration agrees with it; and, if it be true that this was intended by both parties to be the contract between them, the defendant would be bound as a party to be charged, and the memorandum would be sufficient within the statute of frauds. But if Campbell, the defendant, never intended to be bound as the seller, unless Moore was also bound as buyer, and meant that Moore should sign a note, on his part, to bind him, then there was no valid contract between them. We cannot ascertain this point ourselves; therefore, there must be a new trial.

Some other questions are to be considered which may be material on the new trial. An objection was taken to the ruling of my brother Platt as to the rejection of evidence of usage of trade as to delivery orders where goods are warehoused. The defendant tendered in evidence the delivery order for about fifty tons, and was prepared to prove that, by the usage of trade in Liverpool, such delivery orders were in the usual form when goods were warehoused in bulk. My brother Platt refused to allow a question to that effect to be put. If this question had been asked in reference to the purchase of fifty tons of goods contracted to be sold and delivered, simply, and not from a warehouse, doubtless it would not be permitted to give evidence that by usage of trade a transfer or delivery note authorizing the purchaser to receive about fifty tons would be sufficient; but if there is a contract to sell and deliver goods in a warehouse, and the keepers of the warehouses in that place have a known usage not to accept delivery orders or transfer notes, as they are called, except in this form, having an

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objection to make themselves responsible for any particular quantity, the delivery of an order or transfer note may be a sufficient performance of the contract to deliver in some circumstances. For instance, in the simple case of a contract to deliver a quantity of goods now warehoused in a particular warehouse as being about fifty tons; or in the more complicated case of the sale of fifty tons weighed at the landing scales, and now warehoused, such a form of order would be sufficient, coupled with proof in the last case that the goods warehoused were actually of that weight at the landing scales, it being shown that the particular order referred to the identical goods so weighed.

Another question raised on the part of the defendant was, as to the effect of the alteration by parol of that part of the contract, by which the goods were to be taken from the quay. It was contended that this operated as a new contract, embodying all the terms of the old one, except the delivery on the quay, and that such a contract was necessarily a waiver or discharge of the old one, and being made before a breach of the old contract the fourth plea was supported. That plea was, that after the making of the agreement, and before the breach, the agreement was mutually rescinded by the plaintiff and the defendant. We do not think that this plea was proved by the evidence. The parties never meant to rescind the old agreement absolutely, which this plea, we think, imports. Whether a new valid agreement thus substituted for the old one before breach would have supported the plea, we need not inquire, for the agreement was void, there being neither note in writing, nor part payment, nor delivery and acceptance of part or all. This was decided by the cases of *Stead v. Dawber* and *Marshall v. Lynn*, 6 Mee. & W. 109. A further question may arise on the new trial, considering the old contract as still in force in all its parts, which must be done; for instance, whether the plaintiff, on his part, declared his option and readiness to give his acceptance, in due time, to the delivery from the warehouse, instead of the quay, not being authorized by the old contract, the only one in force, for the sufficiency of the delivery of the new order, cannot now be a question. If the plaintiff had already accepted and received the goods warehoused, or even the delivery or transfer order in the form offered, as a performance of the contract on the plaintiff's part, there would have been a good answer by way of accord and satisfaction; but no such question arises in this case.

Rule absolute for a new trial.

Nichol v. Godts.

NICHOL v. GODTS.

June 6, 1854.

Contract, Construction of — Description of Article — Sale by Sample.

The plaintiff having agreed to sell to the defendant a quantity of oil, described as foreign refined rape oil, but warranted only equal to samples, and having delivered oil which was not foreign refined oil, but which corresponded with the samples : —

Held, that the defendant was not bound to accept the same, as he was entitled to the delivery of oil answering the description of foreign refined rape oil, and that the statement in the contract, as to samples, related only to the quality of the oil.

THE declaration stated that the plaintiff contracted to sell and deliver to the defendant, and the defendant to buy and accept, five parcels of refined rape oil, warranted only equal to certain samples, and alleged as a breach that, although the defendant did not accept a part, yet that he did not accept and pay for the residue.

Plea, *inter alia*, that the plaintiff was only ready and willing to deliver to the defendant goods which were not refined rape oil, and were not equal to the samples.

At the trial, before Parke, B., at the London Sittings in Trinity term, the facts were these: The plaintiff sold to the defendant a quantity of rape oil, and at the same time delivered to him samples thereof, stating, as the witnesses alleged, that the oil was mixed to some extent with other oil, and therefore that the plaintiff only sold it as equal to the samples. The sold note was as follows : —

“ London, 31st of January, 1854.

“ Sold this day for Messrs. A. Nichol and Sons, to Mr. U. A. Godts, the five under-mentioned parcels, foreign refined rape oil, being about thirty-three tons (little more or less) warranted only equal to samples, at 35*l.* per ton.”

Then followed a list of the several samples. Rape oil is frequently adulterated with other oil, and especially with hemp oil, and the defendant refused to accept the oil in question, alleging that it was not foreign refined rape oil, but a mixture of rape and hemp oil. The oil sold corresponded with the samples. It was admitted, on the part of the plaintiff, that the oil sold was not pure rape oil ; but he contended and called witnesses to prove, that it was properly described and known amongst merchants in the market as foreign refined rape oil ; and at all events the defendant was bound to accept and pay for it, as it had been sold according to sample. Evidence was given on each side as to the oil being entitled to be called foreign refined rape oil. The learned judge directed the jury that the defendant was entitled to have foreign refined rape oil delivered to him, and the statement in the sold note as to the samples related to the quality of such oil only. The

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jury having found that the oil in question was not foreign refined rape oil, his lordship directed them to find a verdict for the defendant.

Watson now moved for a new trial, on the ground of misdirection. The learned judge misdirected the jury in telling them that the defendant was entitled to the delivery of pure rape oil. This was a sale by sample, and the bulk corresponded with the sample. The plaintiff admits that the article sold was not pure rape oil, but it was sold by sample, for the purpose of precluding all disputes.

[PARKE, B. The only question was, whether the article tendered corresponded with the article described. I told the jury that the statement, as to sample, affected the quality only; that the buyer was to judge of the quality by looking at the sample, but that the oil ought to have been foreign refined rape oil.]

There is no warranty of its being refined rape oil.

[PARKE, B. The plaintiff agrees that the oil shall be refined rape oil.]

POLLOCK, C. B. It is not exactly a warranty; but if a man contracts to buy a thing, he ought not to have something else delivered to him.]

Certainly not; but wine may be sold as sherry, although there may be some cape wine mixed with it.

[PARKE, B. Evidence was given on each side as to this oil being refined rape oil, and that question I left to the jury.]

It was refined rape oil in one sense. The plaintiff, by his warranty of sample, excluded every other warranty.

[PLATT, B. Suppose the plaintiff had sold refined whale oil as rape oil, and had stated it to be according to sample, and it had in fact corresponded with the sample delivered, would that have entitled the plaintiff to recover?]

It is submitted that that is not the same question.

[PARKE, B. You contended that the use of the word "sample" superseded every other description of the article, and you gave evidence also of its being refined rape oil.]

POLLOCK, C. B. There will be no rule in this case. The question turns on the meaning of this contract for the sale of the oil, and the point is, whether the defendant, under the circumstances, was bound to take and pay for the oil he had contracted to buy. The important words in the contract are "foreign refined rape oil, warranted only equal to samples." My brother Parke construed those words by saying that the oil ought to agree with the description of it in the contract as to its character, and that the words, as to the oil being warranted equal to samples, related to the question of quality only. Mr. Watson contended that the word "samples" extended over the other description, and that the defendant was bound to take the oil although it might not answer the description of being foreign refined rape oil. I think my learned brother was right, for, as was well put by my brother Platt, it cannot be contended that a delivery of whale oil would be a performance of the contract. The meaning

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of this agreement is, not that the plaintiff professed to sell any oil whatever, but to sell foreign refined rape oil. But then, Mr. Watson says that the oil in question was taken and understood as between the parties to be foreign refined rape oil, and he called witnesses to show that this was so agreed between them. But as between these parties, any agreement of this sort not being in writing would fail, as, by the well-known rule of law, a written contract cannot be altered by parol. If A and B make a contract in writing which means one thing, it cannot be shown that A said it meant something else, and that B assented to that interpretation. If that rule were once admitted, every written contract would be at the mercy of whatever parties might choose to swear. My brother Parke was quite right in saying that if the plaintiff could show that by the general usage of merchants the oil in question was denominated foreign refined rape oil, and the jury had so thought, he would be entitled to the verdict. The jury found for the defendant, and they added that they believed the witnesses who stated that the defendant well knew that what he was buying was something different from foreign refined rape oil. That expression of opinion, however, was superfluous. The jury did not appreciate the importance of the rule as to written and parol evidence.

PLATT, B. I am of the same opinion. The effect of the warranty was that the oil delivered was equal to the sample. The defendant did not refuse to receive it on the ground of its being different from the sample, but on the ground that it was not foreign refined rape oil. The learned judge told the jury that if the oil was not foreign refined rape oil at all, the defendant was not bound to accept it, and I think the learned judge was right in that direction. The plaintiff agreed to sell foreign refined rape oil, and if the jury had found that the article sold had been called in the market by that name, the defendant would have been bound to accept it. But that point was expressly put to the jury, and they negatived the fact.

PARKE, B. A sale by sample only has reference to the quality of the article sold. The jury were of opinion that the oil did not answer the description of foreign refined rape oil.

Rule refused.

The Guardians of the Lexden Union v. Southgate.

THE GUARDIANS OF THE LEXDEN UNION v. THOMAS SOUTHGATE.

June 13, 1854.

County Court — Prohibition — Executor and Administrator — Judgment — Corporation — Authority to sue.

The guardians of a poor law union issued a summons against the defendant as administrator of John I. S., and also as executor of Jane S., widow of John, to recover 17*l.*, expended by the parish for the support of John I. S. and Jane, and their children. The defendant was the administrator of John I. S., but was not nor had he acted as executor of the widow. No minute was produced by the attorney of the plaintiffs (a corporation,) authorizing him to act on their behalf, pursuant to 5 & 6 Vict. c. 57, s. 17. Judgment was given for the plaintiffs: —

Semble, that the decision of the judgment was erroneous: but held no ground for a prohibition.

THIS was a rule for a prohibition to the judge of the County Court of Essex, held at Colchester, under the following circumstances, stated in the affidavits: The plaintiffs in the county court, who were the guardians of the Lexden Poor Law Union, had issued a summons against the defendant, describing him as the administrator of John Ingate Southgate, and also as executor of Jane Southgate, widow of John Ingate Southgate; and the action was brought against the defendant, to recover the sum of 17*l.* expended by a parish within the union for the support of John Ingate Southgate, his widow and children. The defendant had taken out administration to John Ingate Southgate, but had not been appointed the executor of Jane Southgate, or had done any act to make himself executor *de son tort*; nor was any evidence given at the trial of his having been so appointed, or of his having so acted. The judge of the county court, however, decided that he was executor of Jane Southgate. It was also objected at the trial that, as the Lexden Union was a corporation, the attorney who appeared on their behalf ought to show some authority by minute, or otherwise to act for them, pursuant to the 5 & 6 Vict. c. 57, s. 17, (the Poor Law Amendment Act.) The county court judge decided that this was unnecessary, and the plaintiffs had judgment.

Woollett now moved for a prohibition to the judge of the county court. The defendant ought not to be charged in one summons as administrator of one person and as executor of another; there ought to have been two summonses. He ought not to be sued in a double capacity. As administrator, he would have to account to one set of persons, and as executor to another. It would be impossible to apportion the judgment.

[ALDERSON, B. That is the difficulty I feel: but is it more than a wrong decision?]

The judge of the county court has assumed the power of trying two separate actions under one summons; he had no jurisdiction to do that, therefore prohibition will lie. Then, as to the other point, the

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Lexden Union is a corporation, and their attorney ought, therefore, to have produced some minute, pursuant to the 5 & 6 Vict. c. 57, s. 17, showing that he had authority to appear on their behalf; and without the production of such minute, he could not be considered as in court. The judge ought, therefore, to have struck the cause out of the list, pursuant to the 79th section of the 9 & 10 Vict. c. 95.

Cur. adv. vult.

The judgment of the court¹ was now delivered by

POLLOCK, C. B. In this case, it appears that before the judge of the Essex County Court there was a plaint against the defendant in a double character. The cause was heard, and the judge pronounced a judgment against the defendant in both capacities; and it was contended that that was not merely wrong, but that he had no jurisdiction or authority to do so. We were pressed very much to grant a rule for a prohibition; but we have taken time to consider, and we are of opinion that there ought not to be any rule. In truth, it is a complaint to this court of an erroneous decision, if it be one, as to which it is not at all necessary that we should pronounce any opinion. Here the question was one properly before the judge of the court. It may be that he ought to have decided differently, but a wrong decision is no ground for a prohibition. If a judge of a county court, there being a matter brought before him without a particle of evidence, one way or the other, were to find a verdict against the defendant innocently, or a jury come to a conclusion without a particle of evidence, it would be very wrong, but it would be no ground for a prohibition. There are certain modes in which applications may be made to this court, before a trial, for relief, if the matter be of a certain description, and by the act of parliament there are modes of getting the opinion of this court after the decision, by appeal. This is neither the one nor the other. It is nothing but an application to this court, because it is suggested that the judge of the county court has decided wrongly, and has come to a conclusion which is erroneous. We are of opinion that that is no ground for a prohibition; and, therefore, there will be no rule.

Rule refused.

¹ POLLOCK, C. B., ALDERSON, B., and PLATT, B.

White v. Crisp.

WHITE v. CRISP and another.

July 7, 1854.

Negligence — Sunken Vessel — Duty of Owner — Abandonment of Vessel.

The owner of a vessel which has been sunk in a navigable river is bound to use proper care to prevent accidents to other vessels so long as he has the possession, control, and management of the vessel, that is, so long as by due care and exertion he can either remove the vessel, or so far shift its position as to prevent such injury. This duty attaches to the ownership for the time being, and will be transferred to a purchaser of the sunken vessel; and it makes no difference that the vessel lies in a part of the channel not ordinarily used for navigation: but the duty ceases on the abandonment of the possession of the vessel.

THE declaration stated that, before the happening of the injury hereinafter mentioned, a ship belonging to one John Cooke, of which he was then in possession, and then had the care, management, direction, and control, to wit, by his mariners, and which, being laden with a cargo, foundered and sunk in a certain navigable part of the Bristol Channel, called the Cardiff Sands, where no obstruction to navigation previously existed, and which was a public navigable highway for ships, and along which, vessels were used to be navigated, and that the ship being so sunk, lay there wholly concealed and covered with water, and in such a position, and at such depth, that other vessels would necessarily be in danger of striking against it, unless they had notice of its being there; that, after the said ship had so foundered and lay there, J. Cooke, for a sum of money, transferred possession of the said ship to the defendants, and sold the cargo to them, that they might, for their own profit, raise to the surface and make a profit of the ship and cargo, and then relinquished to the defendants the control, management, and direction of the ship; that the defendants, before the injury complained of, accepted the transfer, and at the time of the acceptance, took possession of the ship and cargo for the purpose aforesaid, and thenceforward up to, and until, and at, and after the happening of the injury complained of, had not exercised the possession, control, management, and direction thereof. Averment, that, although the defendants well knew the premises, and could have done their duty in that behalf, yet they suffered the ship, after the transfer and their said acceptance, and after they assumed and took possession of the vessel, and whilst it was in their possession, control, management, and direction, to continue sunk, and lying in the navigable channel for an unreasonable time, until the happening of the injury thereinafter mentioned, without taking proper care, and using proper means to prevent damage, and without placing any buoy or means to give notice of the place where she lay. The declaration then averred that injury happened to the plaintiff's vessel by striking upon the wreck. To this declaration, there was a demurrer.

The defendants pleaded, thirdly, that the wreck was lying in a part

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of a navigable channel which was not ordinarily passed over by vessels, except during stress of weather; fourthly, that they had used all reasonable means for removing the wreck, but were unable before the time when, &c., to do so; and that, by reason thereof, before and at the time when, &c., they had wholly abandoned and ceased to have any possession of it. To these pleas, there were demurrers and joinder.

Channell, Serg., for the plaintiff.¹ The declaration is good. In the case of *Brown v. Mallett*, 5 Com. B. Rep. 599, on which the defendants will rely, the general principle was not decided, but a question arose merely on the precise allegations in that declaration; and in particular, there was no allegation that the defendant had the management and control of the vessel at the time of the collision. All that the court decided there was, that the words "whereby it became the duty," &c., amounted to nothing, if the preceding allegations did not raise the duty; and if they did raise the duty, then those words were surplusage. Here, however, there is a distinct allegation that the defendants had the control and management of the vessel at the time.

[ALDERSON, B. How can it be said, that a wreck at the bottom of the sea is under the control and management of anybody? The defendants may have the power to control and possess, but not the possession.]

A vessel may be sunk without being a wreck, and there may be a certain control and management of it for the purpose, at least, of raising it; and the plaintiff says, a legal liability results from that state of things.

[POLLOCK, C. B. You say, where the owner of a sunken vessel knows of the mischief, he cannot say: "I'll have nothing more to do with it," and that it is his duty to give information to others. Suppose a crazy vehicle to break down in a road, the owner cannot get rid of his liability by leaving it there. There is a great difference, however, between a narrow river and the ocean, or a place like the Bristol Channel.]

No doubt it ought to appear in the declaration that the place was a public navigable river, and if that does not sufficiently appear, the declaration may be amended.

[ALDERSON, B. There are places in the sea, such as Yarmouth Roads, which are quite as narrow as a river. Your cause of action must be, that the defendants disregarded some duty which they ought to have performed. All the management and control alleged, may, no doubt, have been for the purpose of removing.]

That is all that is contended for.

[POLLOCK, C. B. How long is the owner to keep a buoy attached?]

It must be a reasonable time. After reasonable exertions have been used to raise the ship, he may abandon; and if the declaration does not distinctly negative the supposition of abandonment, there may

¹ June 5, before POLLOCK, C. B., ALDERSON, B., PLATT, B., and MARTIN, B.

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be a difficulty in supporting it; but it does imply that there had been no abandonment. In such circumstances, the defendants were bound to attach a buoy, and are liable for the consequences of not doing so. The general principle is sufficiently recognized in *Harmond v. Pearson*, 1 Camp. 517; *Hancock v. The York, Newcastle, and Berwick Railway Company*, 10 Com. B. Rep. 348; and *The King v. Watts*, 2 Esp. 675. The fourth plea is bad; assuming the duty contended for to exist, no sufficient ground is stated to get rid of it.

Bovill, contra. The declaration is bad. There is no obligation on the owner of a sunken vessel to attach a buoy; if there were, it would only be adding to his misfortune. If such a liability exists, it must apply to vessels in the Atlantic; and no one ever heard of an action of this kind before. The statute 19 Geo. 2, c. 22, was passed expressly to guard against the difficulty, and yet there is no recognition of any such obligation on the part of the owner. In *The Queen v. Watts*, Lord Ellenborough denied it. The only authority apparently in favor of the plaintiff, is *Harmond v. Pearson*; but that is really no authority, for the sole question there was, whether a party who had undertaken to give notice, had given a sufficient notice.

[MARTIN, B. That is not a very intelligible case.]

No; but still, it appears to have turned entirely on the sufficiency of the notice. Then the case of *Brown v. Mallett*, clearly decided that, unless there was control and management, there was no liability: at the most, that case left the general question open. The case of *Hancock v. The York, Newcastle, and Berwick Railway Company*, goes further, and is in favor of the defendants. If this action is maintainable, then every owner of a sunken vessel must be liable to an indictment; for the placing of a buoy is as much a nuisance as throwing logs on a highway. It would lead to endless confusion and mistakes if every owner were to place a buoy where he thought there would be danger. Besides, if liability be once assumed, where is the line to be drawn? for it cannot be said that, in the middle of the Atlantic, a buoy is to be fixed. There is no allegation in the declaration of any negligence or want of skill on the defendants' part, in doing any thing which it was in their power to do. *Seymour v. Maddox*, 16 Q. B. Rep. 326; s. c. 5 Eng. Rep. 265. The third plea is good. It has been decided that, though there may be an obstruction in a navigable river, still, if that part of the river is not generally used, it may be no nuisance. *Dimes v. Petley*, 15 Ibid. 276. The fourth plea is good: it alleges that the defendants had used every means of raising the vessel, but that they had failed, and abandoned possession. The plaintiff admits in such a case they would not be liable.

Channell, Serg., in reply. Here there is an allegation of fact, that the defendants had the control, possession, and management of the vessel; and that being assumed, the legal liability results of attaching a buoy; and the declaration alleges this duty, and a breach thereof.

Cur. adv. vult.

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Judgment was now delivered by

ALDERSON, B. After stating the pleadings, his lordship said: We are clearly of opinion that the third plea is bad. It does not deny that the wreck lay in a navigable part of the channel, and whether that part be more or less frequently used, seems to us a mere question of degree, and unimportant to the plaintiff's right of action. This demurrer must, therefore, be allowed. The real question, however, arose on the declaration and on the fourth plea. This subject was discussed by Maule, J., in his elaborate judgment in *Brown v. Mallett*; and from the principles there laid down by him, which, however, were not all absolutely necessary for the decision of that particular case, we do not disagree at all, as we understand them. He there lays it down thus: "That it is the duty of a person using a navigable river with a vessel of which he is possessed, and has the control and management, to use reasonable skill and care to prevent mischief to others;" and he adds: "His liability is the same, whether his vessel be in motion or stationary, floating or aground, under water or above it; for, in all these cases," he says, "the vessel may continue to be in his possession, and under his management and control." This duty arises out of the possession and control of the vessel being in him, and it is clearly, also, laid down in the same judgment, that this liability may be transferred with the transfer of the possession and control, to another person; and further, that, on the abandonment of such possession, control, and management, the liability also ceases. But it is also clear, from *The King v. Watts*, that from unavoidable accident, producing the wreck of a vessel, no duty arises to the owner to take any precautions, or to remove the impediments to the navigation which are created; there is no reason for throwing on the owner any special care in consequence of what may be considered as a misfortune both to him and to the public. Now here, if we apply these principles to this declaration, we find a distinct averment, that up to and at the time of the injury to the plaintiff's vessel, the defendants, to whom the sunken ship had been transferred, exercised the possession, control, and management, and direction thereof. Now, we understand by this, that the defendants had it in their power, by due care and exertion, to have altogether removed this vessel, or to have shifted at least its position, and so might reasonably have been able to have prevented the injury. If these words do not mean this, we think there was no liability on the part of the defendants; but this being the meaning, as we think, of the words, we think the declaration sufficient, and that the demurrer to it must be overruled. If there be not already a plea to that effect, the defendants should be now at liberty to reverse this averment; and this point, as to the above construction of the words, "control, management, and direction," will be to be stated to the jury as the direction of the judge. The fourth plea, we think good, and, indeed, this was admitted at the time of the argument. It is clear that either the original owner or the transferee of the wreck may abandon it, and so put an end to his liability. Then the plea states that he had done so, adding a very sufficient reason

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for his doing so before the time when the injury to the plaintiff's vessel occurred. The demurrer to the fourth plea must be overruled, and the judgment must be to allow the demurrer to the third plea, and to overrule the demurrer as to the fourth plea and as to the declaration, with liberty to the defendants, if they should be so advised, to add another plea.

Judgment accordingly.

THOMPSON v. BELL, Public Officer of the National Provincial Bank of England.

June 9, 1854.

Banking Company — Authority of Local Manager.

The local manager of a branch bank, while engaged at the bank, suggested to a lady who had a deposit account, that higher interest might be obtained for her money if she purchased two houses for a sum which would pay off a mortgage held by a third person upon them, and also a lien held by the bank. She assented, and gave him her deposit note, for which he gave her a fresh deposit note for the difference between the amount of the former note and the purchase-money, and retained the residue for the purpose of making the investment. This money the local manager appropriated to his own use, and the bank refused to bear the loss:—

Held, in an action against them, that they were liable, the jury having found that the manager intended and induced the lady to believe that he was acting as the agent of the bank, and also, that as local manager he had authority from the bank to make an assignment of an equitable mortgage.

THIS was an action brought against the defendants to recover the sum of 595*l*.

Plea — The general issue.

At the trial, before Erle, J., at the last Spring Assizes, at Winchester, it appeared that the wife of the plaintiff, who was abroad, was residing at Southampton, and had opened a deposit account at the Southampton branch of the National Provincial Bank of England, of which a Mr. Kerr was the local manager. A deposit account is one on which interest is paid as agreed, and may be withdrawn at any time by the customer, without notice. There being 775*l*. to the credit of this account, Mrs. Thompson being at the bank, Kerr represented to her that he could put her in the way of getting higher interest for her money, for that the bank had a lien or mortgage for 195*l*. on two houses at Southampton, belonging to one Williams, but that there was a previous mortgage upon them for 400*l*., which might be paid off, and the houses purchased for 595*l*. He also told her, that if she chose to invest the amount in that way, he would pay off the mortgage and the debt due to the bank, give the balance to Williams, and obtain a conveyance of the property to her. After some negotiation, Mrs. Thompson agreed, and being in the bank parlor with Kerr, gave him her deposit receipt, with which he went into

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the adjoining room, drew out 595*l.* in money and gave her a fresh deposit receipt for 185*l.*, being the balance of her account. He also gave her a receipt for 195*l.*, "being the balance of the purchase-money of the two houses." Kerr misappropriated the 595*l.*, and the bank refusing to bear the loss, this action was brought. The learned judge asked the jury, first, whether Kerr intended and induced Mrs. Thompson to believe that he was acting as agent for the bank or in his individual capacity in the receipt of the money; secondly, whether, as local manager, he had authority on behalf of the bank to make an assignment of an equitable mortgage. The jury answered both questions in the affirmative, and a verdict was found for the plaintiff.

A rule *nisi* to set aside this verdict, and for a new trial, was afterwards obtained, against which

Bramwell and *Barstow* showed cause. The question was properly for the jury to decide, and from their verdict it is clear that Kerr was acting as the manager of the bank. The whole transaction took place at the bank, and was one with which Kerr had no concern except as local manager, nor was the transaction foreign to the business of local manager. It was like the case of a man who goes to a banker and offers to pay the debt due by a customer upon receiving the securities held by the bank. The banker says another person has security for a debt due to him, on which that debt is also paid off. The securities were to be kept by the bank as agent for the plaintiff. *Bishop v. The Countess of Jersey*, 23 Law J. Rep. (N. S.) Chanc. 483, which will be relied on by the other side, is quite distinguishable.

Kinglake, Serg., and *Smith*, in support of the rule. The local manager is not a partner with power to bind the bank, but only an agent with limited authority. Mrs. Thompson was not an ordinary customer, but only had a deposit account, and all that Kerr did as to the investment of her money was done by him as an individual. It is no part of a banker's duty to invest moneys for his customers, and Kerr's principals must not be held responsible for his unauthorized act merely because the transaction took place at the bank. The transaction was not the assignment of an equitable mortgage, but the purchase of the houses. *Bishop v. The Countess of Jersey* is an authority in favor of the defendants. In that case, the plaintiff, who was a female customer of a banking firm, was advised by Wood, one of the partners in the bank, to dispose of certain Dutch bonds, and to place the money upon better security. He then proposed that it should be lent to his own son. This proposal was acquiesced in by the plaintiff in consequence of her having great confidence in the firm. The money was paid out by a check upon the bank to a third person named, or bearer, and the plaintiff received a promissory note for repayment, with a guarantee from Wood. Wood absconded, and the security proved to be worthless. Upon bill filed against the other members of the firm, it was held that they were not liable for

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the loss, as the transaction was not within the scope of a banker's business, and was not recommended or sanctioned by the other partners.

POLLOCK, C. B. We are all of opinion that this rule ought to be discharged. My brother Erle has reported to us that he left it to the jury, whether Kerr intended and induced Mrs. Thompson to believe that he was acting as agent for the bank? If he did, the money is still in the bank, as Kerr was their agent, and that is sufficient to make the bank liable. The local manager is the person acting for the bank, and, for many purposes, must be treated as the whole body. He received the money in the first instance, and gave the deposit note in exchange. He afterwards suggests an investment in a different way, and she draws the money out and returns it to him, and he, as manager, gives a fresh deposit note for part, and retains the rest for purposes previously arranged. To hold that the bank is not liable would be to hand over the public to the mercy of bankers' clerks. The verdict was right, and the jury were asked the right questions.

ALDERSON, B. I am of the same opinion. It is a question of fact entirely. It was a change of investment. The lady had a large sum of money in the bank on the security of a deposit note; a new arrangement is suggested to her by the manager. She accordingly assents, and after taking the money out replaces it in the manager's hands, in a more convenient form to meet the demands which were to be paid before the houses could be obtained. He does not dispose of the money as directed, and the money must be considered as still in the hands of the bank, through their agent, unappropriated. The bank is, therefore, liable to refund the amount.

PLATT, B. I am entirely of the same opinion.

Rule discharged.

PIERCE v. WILLIAMS.

June 21, 1854.

Principal and Surety — Costs of Action against Surety.

The plaintiff guaranteed A that the defendant would upon demand from time to time pay to A what should be due. A demand was made upon the defendant by A, and upon non-payment a writ was issued against the plaintiff for the amount, the writ being the first notification to him of the amount being due and unpaid. He allowed judgment to go by default, and an execution was levied upon his goods:—

Held, that he might recover against the defendant the costs of the writ at the suit of A, but not the costs of the subsequent proceedings.

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THIS was an action, by the plaintiff, to recover certain moneys and costs that he had been called upon to pay for the defendant under a guarantee entered into for him, by which the plaintiff guaranteed to the National Provincial Bank of England, "That the defendant should, upon demand, from time to time pay to them what was due." A demand had been made upon the defendant by the National Provincial Bank for the amount due, and upon non-payment they issued a writ against the plaintiff for the amount, the writ being the first notification to him of the amount being due and unpaid by the defendant. The plaintiff allowed judgment to go by default, and execution was subsequently levied for the amount of the debt and costs. He then brought the present action, and at the trial, before Williams, J., at Beaumaris, at the Spring Assizes, recovered a verdict for the full amount of the debt and costs that had been levied under the execution.

A rule *nisi* was subsequently obtained to reduce the damages by the amount of the costs, against which

M'Intyre showed cause. The principal debtor is liable for these costs, just as a party who has accepted a bill of exchange for the accommodation of the drawer may, if sued, recover against the drawer the costs of the action. *Jones v. Brooke*, 4 Taunt. 464; *Stratton v. Mathews*, 3 Exch. Rep. 48.

[ALDERSON, B. That must be on some ground peculiar to an accommodation bill.]

How could the present plaintiff know what he was to pay? At least the costs of the writ should be recovered.

Lloyd, contra, was not called upon.

PER CURIAM.¹ The costs of the writ only can be recovered, as that was the only necessary expense to which the plaintiff was put by the proceedings. He is supposed by law to have the money ready to pay without the process of execution.

Rule to reduce the damages, accordingly.

¹ ALDERSON, B., PLATT, B., and MARTIN, B.

Beavan v. M'Donnell.

BEAVAN v. M'DONNELL.

June 12, 1854.

Evidence — Lunacy — Conduct before and after Contract.

A contract having been made between the plaintiff, who was insane, and the defendant, which it was sought to set aside : —

Held, upon an issue, whether the defendant had notice of such insanity, that evidence was admissible of the plaintiff's conduct both before and after the signing of the contract, in order to show that the character of his disease was such that it must have developed itself to one having the opportunity of observation afforded to the defendant, though a stranger.

THIS was an action to recover 446*l.*, as money had and received, and interest thereon.

Plea — that the money was paid as a deposit on the purchase of an estate by the plaintiff, and that the contract being broken, the deposit was forfeited by its terms.

Replication, that the plaintiff was a lunatic at the time of making the contract.

Rejoinder, that the defendant was not cognizant of such lunacy, and that the contract was entered into by him with the plaintiff fairly and in good faith.

This allegation was traversed by the surrejoinder.

At the trial, at the Hereford Spring Assizes, before Wightman, J., the plaintiff's insanity when the contract was entered into is proved, and evidence was offered of acts of insanity and of his conduct prior to the contract being made, and even prior to the defendant having become acquainted with him, and also of similar acts after the contract. This evidence was objected to, but the objection was overruled, and the plaintiff had the verdict.

A rule *nisi* for a new trial was subsequently obtained on the ground of the improper reception of the evidence, and also that the verdict was against the evidence ; against which

Keating and *Skinner* showed cause. The evidence was properly received, for the jury would only be able to answer the question whether the defendant was aware of the plaintiff's insanity by being informed of the nature and character of that insanity, as shown by the plaintiff's whole conduct, and in this way they would be furnished with the means of judging whether it was possible for the defendant to have been unobservant of the plaintiff's state at the time of the contract. The surrounding circumstances connected with an act must necessarily be relevant to an issue as to that act. In most cases, such issue as this could only be decided by inferences from the nature of the particular disorder. The principles as to the validity of contracts by lunatics are settled in *Molton v. Camroux*, 2 Exch. Rep. 487 ; 4 Exch. Rep. 17, (in error.)

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Whately, Gray, and Phipson, in support of the rule. The issue in this case was, that the defendant did not know of the insanity, but acted *bonâ fide*; the issue, therefore, is on the *scienter*, for the insanity is admitted, and the evidence ought to be confined to the question of the defendant's knowledge. The defendant, therefore, contends that all evidence of the plaintiff's insanity, both before and after the occasion when the defendant saw him, ought to be excluded.

[POLLOCK, C. B. Suppose three days after the interview between the plaintiff and the defendant a medical man had seen the lunatic, surely that medical man might have been able to say, from the character of the insanity, that the lunatic was insane three days before the interview.]

That might be so, if the lunacy had been continuous, but of that fact there was no evidence.

POLLOCK, C. B. I think this rule must be discharged. It was moved for on two grounds; first, that evidence was improperly received; secondly, that the evidence given did not sustain the issue. As to the second point, the learned judge who tried the cause reports that he is satisfied with the verdict, and I must say I concur with him in opinion; but then it is contended, that the evidence of insanity existing subsequently to the date of the contract ought not to have been received. On the other hand, the plaintiff urged that the nature of the insanity was such that the defendant might have known it at the time of the contract. Mr. Phipson says that the evidence ought to support the issue, and without doubt it ought; and on the other side, it is contended that the issue of knowledge is made out because the insanity was of such a nature that the defendant must have been aware of it. It is clear there is no difference between the case of insanity existing before or after the time when the proof of the knowledge becomes important. The question was, whether the insanity was not of such a description that it must have existed prior to the time when evidence of it was given, and, therefore, must have been known to the defendant at the time of the contract. It may perhaps be, that the effect of the evidence given was to prejudice the jury against the defendant; but still, I think that the evidence was admissible to prove the issue in question. His lordship then commented on the facts of the case with reference to the verdict being against the evidence.

ALDERSON, B., concurred.

PLATT, B. I am of the same opinion. It was important, with a view to the issue, to show what was the nature of the madness, whether it was of a quiet kind or the reverse; because in the one case, the madness being more apparent, there would be the more ground for concluding that the defendant must have known it. Now, it was necessary to ascertain the state of the lunatic's mind, and with that view it was important to know what his condition was both before and after the making of the contract, because if the party was insane

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either just before or just after the making of the contract, it raises an inference that the defendant must have known it. When, indeed, insanity is to be proved to have existed at a certain time, evidence of other acts of insanity taking place long after the time in question is entitled of course to less weight. It then becomes a question of degree, and the effect of the evidence is less in proportion to the lapse of time. In this case, the conduct of the plaintiff both before and after the making of the contract in question was evidence for the jury. It was evidence, but not conclusive proof.

MARTIN, B. As to the question of the reception of the evidence, I think the judge was right. The case did not depend on any rule of law, but was a mere matter of common sense, and the plaintiff was right in submitting this question to the jury as men of common sense. His argument was, that as the insanity existed both before and after the contract, the defendant must have known it at the time of the contract. A man in private life would take the same course if he wished to inquire whether a man was insane at a particular time; he would endeavor to discover whether he was insane shortly before or shortly after that time. The plaintiff was, therefore, right in laying the evidence in question before the jury. As to the term of the insanity, and its proximity to the date of the contract, that was a mere matter of degree affecting the weight of the evidence, and not its admissibility. If, indeed, a delusion were proved to exist only on one occasion, that would afford but slight evidence of the party being insane on any other given occasion; but if the delusion had been proved to exist every day, it would be reasonable to infer that the party displayed his insanity to one person as well as to another.

Rule discharged.

JONES v. NICHOLSON and another.

May 31, 1854.

Shipping — Insurance — Barratry — Master — Part-Owner.

Barratry may be committed by the master of a ship who is part-owner.

Where the master, being part-owner, fraudulently sold the ship and cargo, and applied the proceeds to his own use: —

Held, that this was a loss insured against by the words "barratry of the master," and per MARTIN, B., also by the words "all other perils, losses, and misfortunes."

THIS was an action brought by the plaintiff, an underwriter, to recover a sum of money he had paid to the defendants under a policy of insurance upon goods, as for a total loss.

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At the trial, before Wightman, J., at the Summer Assizes for South Lancashire, held at Liverpool, in 1853, a verdict was taken for the plaintiff, subject to a case.

The case stated, that on the 15th of October, 1845, the defendants effected a policy on a cargo of timber, on board the ship *Helena*, the master being David Moffatt, for the voyage from Monte Video to Valparaiso. The policy was valued at 2,000*l.*, "free from particular average, unless stranded," and the perils were of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, reprisals, takings at sea, arrests, restraints, and detentions of all kings, princes, and people, of what nation, condition, or quality soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods and merchandises, &c., ship, &c., or any part thereof." The plaintiff subscribed as an underwriter, for 100*l.* On the 23d of July, 1849, an agreement for charter was made, at Monte Video, between Moffatt, who was then in possession of the vessel and master thereof, and who was therein described as owner and master thereof, and the defendants' firm of Nicholson, Green, and Co., for a voyage to Valparaiso. The charter-party provided, among other things, that the ship should receive from the said merchants, or their agents, a full and complete cargo, and also receive all goods sent on board with an order from the charterers; that as to any deck cargo the master was to be guaranteed against dangers and accidents of the seas; that the charterers should pay for the hire of the said vessel a certain sum for the voyage, on the right delivery of the cargo; the master to sign bills of lading, and the vessel to be addressed to the charterers' agents in Valparaiso. The goods insured were subsequently shipped, by the defendant, at Monte Video for Valparaiso in pursuance of the said agreement for charter; and on the 20th of August, 1849, *The Helena*, with the goods, sailed from Monte Video, under the command of Moffatt. In April, 1850, the defendants applied to the plaintiff and the other underwriters for payment as for a total loss upon the policy, upon the ground that the vessel had not been heard of as having arrived at Valparaiso, and thereupon the underwriters, respectively, on the 5th of April, 1850, agreed to pay the defendants a total loss upon the terms stated in a memorandum indorsed on the said policy as follows: "Agreed to sign off a total loss on this policy, on the understanding that, in case the vessel should be heard of hereafter, the underwriters are to be put upon the same footing as if this payment had not been made;" and, accordingly, on the 13th of May, 1850, the plaintiff paid to the defendants the sum of 80*l.*, being the amount of his subscription after deducting 20*l.* for short interest, the defendants' interest being declared to be 1,600*l.* The *Helena* was built at Sydney, Cape Breton, by Moffatt and his brother, and was registered on the 6th of August, 1847, in the names of Moffatt as owner of $\frac{3}{4}$ ths, and his brother as owner of $\frac{1}{4}$ ths of the vessel. And on the 3d of September, 1847, they mortgaged the vessel, in conformity with the 8 & 9 Vict. c. 89, s. 45, but the mortgagee did not take possession of the vessel. After leaving

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Monte Video, Moffatt, without the consent of either of the defendants, or of the other part-owner, or of the mortgagee, proceeded direct to the Cape of Good Hope, instead of Valparaiso, and on arrival at the Cape of Good Hope, landed the goods of the defendants in good order, and there, previously to the 5th of April, 1850, and fraudulently against the defendants and all others interested, and for his own purposes, sold the goods; and there, also, fraudulently against the mortgagee, and for his own purposes, sold the vessel, and applied the proceeds of both ship and cargo to his own use. In the summer of 1851, it came to the knowledge of the defendants, at Monte Video, that Moffatt had fraudulently sold the vessel and cargo as above mentioned, and that the vessel had sailed from the Cape of Good Hope under another charter for London, and they immediately informed the underwriters. The plaintiff thereupon applied for the return of the money he had paid, on the ground that no loss had occurred within the terms of the policy. The defendants denied their liability; and the present action was brought, the declaration being framed on the promise of the 5th of April, 1850.

The question for the opinion of the court was, whether there was a loss by barratry, or otherwise, within the policy.¹ If there was no such loss, the verdict was to be for the plaintiff for 80*l.*, with interest at 5*l.* per cent. per annum, from the 6th of February, 1852. If there was such loss, a nonsuit was to be entered.

Cowling, (*Atherton* with him,) for the plaintiff. The question is, whether this is a loss within the words, "barratry of the master and mariners;" and it is submitted that it is not. Moffatt was a part-owner, and as such he could not commit barratry. *Arnould on Marine Insurance*, 832; *Phillips on Insurance*, 617; *Nutt v. Bourdieu*, 1 Term Rep. 323; per Lord Mansfield, in *Lewen v. Suasso*, reported in Postlethwaite's Universal Dictionary of Commerce, tit. "Assurance," p. 147.

[ALDERSON, B. Why may not a part-owner commit barratry? Lord Tenterden's opinion seems to have been that he could. *Abbott on Shipping*, 7th edit., 184. A master who is owner cannot commit barratry, because he may do what he likes with his own; but if a master is only part-owner, he can commit a fraud against the other part-owners.]

It may be said that Moffatt was not part-owner, because of the mortgage; but as the mortgagee had not taken possession, this is immaterial. The 8 & 9 Vict. c. 89, s. 45, expressly enacts that the mortgagee shall not be deemed the owner. It may also be said, that Moffatt had parted with the ownership by the charter-party. But that is not so. The charter-party was a mere affreightment sounding in covenant, and the freighter was not clothed with the character of owner. *Marcardier v. The Chesapeake Insurance Company*, 8 Cranch, (American,) 39; *Vallejo v. Wheeler*, Cowp. 143; and *Nutt v. Bour-*

¹ The words "or otherwise" were added at the suggestion of the court.

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dieu. *Soares v. Thornton*, 7 Taunt. 627, is distinguishable, for the charterer there had complete control over the ship under the particular provisions of the charter-party. Therefore, unless a part-owner can commit barratry, the plaintiff must succeed. The amendment was made to raise the question, whether this was a loss within the general words. It must be a total loss or nothing, because there is a warranty against general average. Now, the goods are still in existence, and the sale was void unless justifiable. The recovery of the goods may be attended with great expense, but that only makes it a partial loss. *Cullen v. Butler*, 5 M. & S. 461, will be cited as to the extended meaning of the general words; but there the loss took place on the sea: here it was on land.

[POLLOCK, C. B. Surely, it was a peril that might happen in the course of the voyage, that is, a peril of navigation.]

Wilde, (with whom was *Hill*,) for the defendants. The defendants contend that this was barratry, and no aid is sought from the general words. "Barratry" is fraud or malversation by the master in his office towards the ship or goods. Then, as a part-owner can commit fraud against the other part-owners, he can commit barratry. In *Stamma v. Brown*, 2 Str. 1173, as stated in *Earle v. Rowcroft*, 8 East, 126, Lee, C. J., defines "barratry" as being "some breach of trust in the captain, *ex maleficio*." In *Lewen v. Suasso*, Lord Hardwicke defined it to be "an act of wrong done by the master against the ship or goods." In *Lockyer v. Offley*, 1 Term Rep. 252, Willes, J., says: "Many definitions of barratry are to be found in the books, but, perhaps, this general one may comprehend almost all the cases. Barratry is every species of fraud or knavery in the master of the ship, by which the freighters or owners are injured."

POLLOCK, C. B. We are all of opinion that the plaintiff is not entitled to our judgment. The question of total loss is raised between the parties, though the assured are the defendants, reversing the ordinary position of the parties. The question is, whether there was such a loss by barratry, or otherwise, within the policy. I lay no stress on the fact of the ship having been mortgaged, nor on the form of the charter-party; but, looking at the question simply on the ground of barratry, I am of opinion that if the master happens to be part-owner, and without the consent of the other part-owners of the ship and of the owners of the goods, fraudulently disposes of the ship and goods, he is guilty of barratry. I forbear to say any thing as to the question raised by the amendment, as it is not necessary to decide whether it is a loss *ejusdem generis* with barratry, and it might lead to a wide field of argument.

ALDERSON, B. I am of the same opinion. Barratry must be a fraud against the owners, and if it is a fraud against any of the owners, it is not the less a fraud because the master happens to be a part-owner. A sole owner cannot commit barratry, but a part-owner

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may. If it be not barratry, it may be within the other words of the policy.

PLATT, B. The loss was consequent on an act of knavery by the captain; and is not that a fraud upon the other owners, who have separate rights to their several shares?

MARTIN, B. I am of the same opinion. The act of the master is within the meaning of the barratry given in the note to *Goram v. Sweeting*, 2 Wms. Saund. 202, b, n. 13. I should also think that it is a loss within the general words of the policy, the loss being of the same character as barratry; and *Cullen v. Butler* shows that these words include other cases of damage of the like kind with those which are specially enumerated.

Judgment of nonsuit.

IN THE EXCHEQUER CHAMBER.

HAMMOND v. BRADSTREET.¹

July 3, 1854.

Evidence — Boundaries between Counties — County Map.

In order to show that a house was situated in the county of N. the plaintiff tendered in evidence a map printed on paper from an engraved copperplate, having on the face of it these words: "A new map of the county of S., taken from the original map published by J. K., in 1736, who took an accurate survey of the whole county, now republished, with corrections and additions, by J. and W. K., sons of the author, 1766, and engraved by J. R." The map was produced by a witness, who was a magistrate of the two counties, N. and S. He had bought it twelve years before the trial: —

Held, that the map was not admissible in evidence.

THIS was a writ of error on a bill of exceptions to the ruling of Lord Campbell, C. J.

The action was replevin for taking goods in the county of Norfolk. The first issue joined was on the plea that the defendants did not take the goods *modo et formâ*. The second was on an allegation in a plea that they took them in Southdown, in the parish of Gorleston, in the county of Suffolk, *absque hoc*, that they took these goods in the county of Norfolk. To this plea, in order to have a return of the goods replevied, an avowry was added, that the goods were taken by the defendants, the overseers of the parish of Gorleston,

¹ *Coram* COLERIDGE, J., MAULE, J., WIGHTMAN, J., CRESSWELL, J., ERLE, J., CROMPTON, J., and CROWDER, J.

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with Southdown, in the county of Suffolk, under the authority of the 43 Elizabeth. The plaintiff proved that the defendants took the goods in his house situated on the north side of an estuary, called Breydon Water; and in order to show that the goods were taken in Norfolk, he tendered in evidence a map, printed on paper from an engraved copperplate, and having on the face of it, as part of the general impression, the following printed words and figures, that is to say: "A new map of the county of Suffolk, taken from the original map published by John Kirby in 1736, who took an accurate survey of the whole county, now republished, with corrections and additions, by Joshua and William Kirby, sons of the author, 1766, and engraved by John Ryland." The map appeared to be ancient, and did not comprise any land lying north of Breydon Water, as part of the county of Suffolk. It was produced by a witness, a magistrate of both Norfolk and Suffolk, who stated that he had purchased it twelve or fourteen years ago; that at the time he purchased it, he had never heard of any dispute about the boundaries of the two counties, nor was any evidence given to the jury that at the time of the purchase there was any such dispute. The plaintiff further tendered the instrument of apportionment of the tithe rent-charge of Southdown, confirmed by the tithe commissioners and duly sealed, dated the 14th of July, 1843, together with the map annexed thereto and referred to therein, also duly confirmed and sealed by the tithe commissioners. Neither the instrument of apportionment, nor the map, included the plaintiff's house or any land north of Breydon Water. The defendant objected to the reception of those several documents; but the learned Chief Justice admitted them in evidence.

June 16. *Palmer*, for the plaintiff in error, the defendant below. The map of the county of Suffolk was not admissible in evidence. It is not an original, only a copy; and it professes not to be an exact copy, for it states on the face of it that there have been corrections and additions. It was not shown that the party who made it had any knowledge of the county; and though, as the question of the boundaries of the two adjoining counties was incidentally in issue, hearsay evidence of deceased persons was admissible, yet it is only of those persons who are conversant with the neighborhood. Nor is it made by any one having public authority to make it. *The Duke of Beaufort v. Smith*, 4 Exch. Rep. 450; *Evans v. Taylor*, 7 Ad. & E. 617; *Pollard v. Scott*, Peake, N. P. 18; *Regina v. Milton*, 1 Car. & K. 58; *Weeks v. Sparke*, 1 M. & S. 679. Further, the map does not come from the proper custody. The owner says he bought it at a shop, and has kept it twelve or fourteen years. That will not make it admissible as coming from the proper custody. Secondly, the tithe apportionment and map were improperly admitted. The tithe commissioners, who made the map, had no authority to determine boundaries.

Couch, for the defendant in error, the plaintiff below. The map

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must be presumed to be made at the time of its date, 1776. It was not, therefore, necessary to prove that it came out of any particular custody as the proper custody, after that lapse of time.

[MAULE, J. It may be doubted whether there can be any proper custody for an instrument of this kind.]

The custody is sufficient here to free the parties from the suspicion of its being made for a particular purpose. *The Bishop of Meath v. the Marquis of Winchester*, 4 Cl. & F. 445. It need not be shown that the person who made it was conversant with the county, for the boundary of a county may be considered as a matter of so general interest that any one may be supposed to be acquainted with it, so as to render his evidence admissible. *Freeman v. Phillips*, 4 M. & S. 486; *Crease v. Barrett*, 1 Cr. M. & R. 925; *Barker v. Wray*, 2 Russ. 63. Secondly, the tithe map and apportionment were admissible. They were put in to show that the place in question did not pay tithe to Southdown, and that, therefore, it was not in Southdown. In *Plaxton v. Dare*, 10 B. & C. 17, church-wardens' assessments were admitted to prove that a place was within a parish. The tithe map is stronger evidence than that of a person who actually collected the tithes, for it is made under the provisions of the Tithe Commutation Act, 6 & 7 Will. 4, c. 71. The tithe map is made evidence, s. 64. The statute 2 & 3 Vict. c. 62, amended by the 3 & 4 Vict. c. 15, enables the tithe commutation commissioners to set out new boundaries of parishes. *In re Dent*, 8 Q. B. Rep. 43.

Cur. adv. vult.

The judgment of the court was now delivered by

COLERIDGE, J. The decision of this case depends on the admissibility of two documents which were tendered in evidence at the trial, and received after objection. If either were inadmissible, a *venire de novo* must be awarded. [His lordship here stated the issues and facts as to the county map.] One question argued before us was, did this map come from the proper custody? In one sense it did; for it was produced by a gentleman, a magistrate, who bought it twelve years ago; but the fact of its being in the custody of the party who had such lawful possession of it does not at all vouch for its accuracy, nor that it is what it professes to be. It is wholly unlike a deed purporting to be a conveyance of land. If such a deed is found in the custody of the party who, if it were such a conveyance, would have the right to it, and kept among his title-deeds, such custody tends to show that it is what it professes to be. But assuming it to be what the inscription upon it declared it to be, a map prepared in 1766, in part from an older map, in 1736, by Joshua and William Kirby, sons of John Kirby, who made the survey in 1736, at the utmost this is only a declaration by Joshua and William that they believed the boundaries to be as described by him, or that they were as described by them. What circumstances were given in evidence to render such declara-

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tion admissible? The relation of Joshua and William to John Kirby would not have that effect. They do not appear to have been deputed to make the map by any person interested in the question, nor did they appear to have had any knowledge of their own on the subject, nor to be in any way connected with the district so as to make it probable that they had such knowledge. The grounds on which ancient pedigrees are received in evidence are therefore wanting in this case. We think, therefore, the map was inadmissible. There was a second point in the case, as to the admissibility of an apportionment under the Tithe Commutation Act, with a map annexed to it, which was tendered and received in evidence by the learned judge who tried the cause. We have had some doubts on that matter; but we should have come to a conclusion on them if we thereby could have assisted the learned judge who will have to try the cause again in a decision of the point when it shall arise. But it appears to us if we were to decide it on the present statement in the bill of exceptions, the parties on either side will have to add new facts, so as so entirely to vary the question of its admissibility, that we should render no assistance by pronouncing an opinion on it. It strikes us as a matter to admit of a great deal of argument and doubt; and as far as matter of prudence goes, it would be a question for consideration whether it would not be better for those who tendered it not to press the admissibility of it on the second trial. We say nothing more than that there must be a *venire de novo* on the other point.

Venire de novo.

NICKLIN and others v. WILLIAMS.

July 3, 1854.

*Action, When maintainable — Right to support of adjacent Soil —
Damages — Accord and Satisfaction.*

The withdrawal of any part of the stratum to the support of which the owner of the adjacent soil or house thereon is entitled, is a cause of action, as an injury to the right, although no immediate damage ensues; and no fresh cause of action accrues by the occurrence of subsequent damage. Therefore, to an action for damage caused by such withdrawal, it is a good answer that a prior action has been brought for damage consequent upon the wrongful act, and an accord and satisfaction agreed to and performed between the parties.

THE declaration stated, that before and at the time of the committing of the grievances by the defendant, as hereinafter mentioned, the plaintiffs were seised in fee of certain land, with certain houses, cottages, and other buildings erected, standing, and being thereon, which said land, houses, and cottages, and other buildings were con-

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tiguous and near to certain other land, and the plaintiffs were entitled to the support of their said land, houses, buildings, and cottages by the said land to which the same were so contiguous and near, as aforesaid, and by the strata under the same, and also by the strata of minerals under their the said plaintiffs' said land, of which last-mentioned strata they, the plaintiffs, were not seised, nor did the same belong to them; and that the defendant wrongfully, carelessly, negligently, and improperly, and without leaving any proper or sufficient pillars, or supports in that behalf, and contrary to the custom, and course, and practice of mining used and approved of in the country where the mines hereinafter mentioned are situate, worked certain coal and other mines under the said land, houses, cottages, and other buildings of the plaintiffs', and under the said land so contiguous to the same as aforesaid, and dug for, got, and moved the coals, minerals, earth, and soil of and in the said mines, and by reason thereof the soil and surface of the said land of the plaintiffs sank and cracked.

The second plea was, that after the committing of the alleged grievances, and before this suit, it was agreed by and between the plaintiffs of the one part, and the defendant and one Benjamin Wright, since deceased, of the other part, in the manner following: that is to say, after reciting that an action at law had been commenced against the said Benjamin Wright and the defendant, to recover compensation in damages for the injury done to certain property consisting of six houses, outbuildings, land, and premises, (being the land, houses, cottages, and other buildings of the plaintiffs in the declaration mentioned,) by the working of the mines under, or adjoining the same, by the said Benjamin Wright and the defendant, (the damages, injury, and claim in the declaration above mentioned being the same damages and injury as in the said agreement mentioned, and no other or different,) it was thereby agreed that all further proceedings in the said action should be stayed, upon the following terms, namely, that the said Benjamin Wright and the defendant, within five months from the date thereof, should make good all damage done, or occasioned to the said premises as aforesaid, and restore and put the same in substantial and thorough repair, to the satisfaction of Solomon Powell, of Tipton aforesaid, surveyor, and with such good and sufficient materials, and in such manner in all respects as he should require, and thereupon the plaintiffs accepted the agreement in full satisfaction of the damages sustained in the declaration.

The plaintiffs new assigned, that they sued not for the damages, injury, or claim in satisfaction and discharge of which the agreement in the said second plea mentioned was entered into and performed, but for that after the repairing in the said second plea mentioned, and before the commencement of this action, by reason of the same acts of the defendant which caused the damage in respect of which the said agreement was entered into, being part of the acts in the declaration mentioned, the land on which the said houses, cottages, and other buildings in the declaration and the said plea mentioned were erected, standing and being further sank in, cracked, swagged, and gave way, by reason whereof the said houses, cottages, and other buildings so

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repaired as in the second plea mentioned, and other houses, cottages, and buildings of the plaintiffs erected, standing, and being on the same land, gave way, cracked, sank, and were displaced and distorted, and became ruinous, fallen down and destroyed, and thereby became of little or no value to the plaintiffs, as in the declaration mentioned; and that after the repairing in the said second plea mentioned, and before the commencement of this action, the defendant wrongfully, carelessly, negligently, and improperly, and without leaving any proper or sufficient pillars, or supports in that behalf, and contrary to the custom and course, and practice of mining used and approved of in the country where the mines hereinafter mentioned are situate, worked certain coal, and other mines under the said land, houses, cottages, and other buildings of the plaintiffs in the declaration mentioned, and under the said land so contiguous to the same as in the declaration mentioned, and dug for, got, and moved the coals, minerals, earth, and soil of and in the said mines, &c.

Demurrer as to that part of the new assignment which related to the injury caused by the same act, which was the subject of the former action, and joinder.

Phipson, in support of the demurrer.¹ The question is, whether the first action did not exhaust the plaintiffs' right to redress. The plaintiffs' right was infringed upon by the digging there complained of, and there was no continuous act of trespass which could be made the subject of an action from time to time. The Statute of Limitations would run from the time of the original excavation, and the defendant was not liable to any action for omitting to do what would prevent any further injury. *Clegg v. Dearden*, 12 Q. B. Rep. 576. Damages may be given prospectively where the injury from the act complained of will continue, as where an action is brought for injury to a servant, damages may be estimated down to the time when the disability may be expected to continue. *Hodsoll v. Stallebrass*, 11 Ad. & E. 301. The right of action having once accrued, the whole damages must then be recoverable, and it will be found that the cases which may appear in favor of the plaintiffs, such as *Roberts v. Read*, 16 East, 215, and *Gillon v. Boddington*, Ry. & M. 161, were cases in which the right of action did not accrue until the damage consequential upon the act occurred, as pointed out by Bayley, J., in *Wordsworth v. Harley*, 1 B. & Ad. 391. There is no fresh cause of action from the discovery of subsequent damage, but it is limited to the original act, however difficult it may be to estimate remote consequences. He referred to *Fetter v. Beale*, 1 Salk. 11; *Sutton v. Clarke*, 6 Taunt. 29; *Lord Oakley v. The Kensington Canal Company*, 5 B. & Ad. 138; *Howell v. Young*, 5 B. & C. 259; *Thompson v. Gibson*, 7 Mee. & W. 456, and *Holmes v. Wilson*, 10 Ad. & E. 503. If the damages might have been taken into consideration at the time the agreement was made, then it must be held in point of law that they were considered.

¹ June 16, before PARKE, B., ALDERSON, B., PLATT, B., and MARTIN, B.

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Gray, contra. In such a case as the present there must be damage, as well as an act done, to the right. The plaintiff, being entitled to the support of the adjoining soil, does not acquire a right of action until there is damage by the removal. How can it be said that injury has been caused to his right of support before any consequences have arisen from the removal? Each person is allowed to remove his own stratum, so long as he does not injure his neighbour, and until the injury arises the removal cannot be shown to be wrongful. The consequences of the act might have been prevented by the defendant by artificial support, and no cause of action would then have arisen. Injury of this kind is really of the nature of a continuing nuisance. *Roberts v. Read* and *Gillon v. Boddington* are authorities in favor of the plaintiffs. He referred also to *Hambleton v. Veere*, 2 Wms. Saund. 169; *Littleboy v. Wright*, 1 Lev. 69, and *Thompson v. Gibson*. It is not like the case of an injury to an abstract right, as in *Ashby v. White*, 2 Ld. Raym. 938.

[PARKE, B. Would not abstaining from complaining when the act was done be evidence of want of right?]

Cur. adv. vult.

Judgment was now delivered by

PARKE, B. (After stating the pleadings, his lordship continued): It was not disputed, that the agreement mentioned in the plea and its performance were an answer to the then existing cause of action; and the only question in this case is, what is that cause of action? Was it the actual damage to the plaintiffs' land or house, or injury to the plaintiffs' right to have their land and house supported by a stratum of coal under and near it, so that when any part of the stratum that was necessary for the support of the house was withdrawn there was a cause of action, although no actual damage was done? Every injury to the right imports a damage, as laid down in *Ashby v. White*, by Lord Holt, and adopted and recognized in several other cases referred to, and in 3 *Sumner's American Reports*, p. 196, where the subject is fully discussed, as well as in *Embrey v. Owen*, 6 Exch. Rep. 353; s. c. 4 Eng. Rep. 466. We think this action is for an injury to the right, and consequently there was a complete cause of action when the wrong was done, and not a new cause of action when damage was sustained by reason of the original wrong. When so much of the coal or stratum was taken away as to deprive the plaintiffs' house and land of the support to which the plaintiffs were entitled, a cause of action arose, although no actual damage accrued by the sinking of the land, or the falling of the house, or any part of it, or even by that part being cracked or displaced; although it would not be easy to prove that the essential part of the support was withdrawn, unless some actual effect on the land or structure was produced. For this reason the plaintiffs would have a right to recover the full compensation for the damage to the fabric, and if they had already obtained a verdict, with damages, they must be presumed to be satisfied for all the consequences of the wrong; and if instead of having the verdict, they had received, with

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their own consent, satisfaction, such satisfaction is to be considered to compensate for all the consequences of the wrong. It remains to consider some cases cited on the argument before us and relied on, showing that the limitation of actions under particular statutes directed to be brought within a certain time from the act committed, dated from the period when the consequential damage was occasioned, and therefore it was said the damage was the cause of action. These statutes mean, no doubt, the limitation to run from the act that is the cause of action; but on examining the cases, they do not appear to be for injuries to rights, which this is, but solely for consequential damage; and therefore they do not apply. The case of *Roberts v. Read*, the first case upon the subject, seems to have been an action for depriving the plaintiff's wall of the support of the adjoining land in the street, to which it was entitled, by altering the natural level of the street, in consequence of which the foundation of the wall was exposed to rain, the flowing of water, and frost, and the wall fell. In such a case, there was no right of action until the wall itself was injured. The same observation applies to the case of *Gillon v. Boddington*. It seems clear that the damage was done by the sudden flowing in of the water, damaging the wheat and wetting the machinery. The report shows that the wall was "undermined," (that is the expression used,) by the company deepening the dock; but the context explains that the word is not to be understood to mean that it was deprived of the support to which the plaintiff had a right, but the cause of action was from the making of an excavation, the consequence of which was the water of the river washed away the soil from under the wall. The case of *Sutton v. Clarke* was also a case of consequential damage, not for injury to the right. We think, therefore, the defendant is entitled to our judgment.

Judgment for the defendant.

WORTH and others, Church-wardens and Overseers of East Retford, v.
NEWTON.

[July 7, 1854.]

Assistant Overseer — Bond — Sureties — Incompatible Offices.

The acceptance of the office of overseer does not operate as a resignation of the office of assistant overseer, under 59 Geo. 3, c. 12. And even assuming that those two offices are incompatible, where such assistant overseer continues to perform the duties of assistant overseer after his appointment as overseer, and is guilty of defalcations, the sureties to the bond taken under the provisions of that statute are liable.

Semle, that the offices of overseer and assistant overseer are not necessarily incompatible.

THIS was a special case stated without pleadings under the Common Law Procedure Act. The action was brought by the plaintiffs,

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the church-wardens and overseers of the poor of the parish of Retford, in the county of Nottingham, at the time of commencing the action, against the defendant on his bond, as surety for John Shadrack Piercy, late assistant overseer of the poor of the said parish, under the following circumstances :—

In 1843, John Shadrack Piercy was, according to the provisions of the statute 59 Geo. 3, c. 12, nominated and elected by the vestry of the said parish, and appointed by two justices of the borough of East Retford, assistant overseer of the poor of the said parish, at a yearly salary of 6*d.* in the pound upon the rates annually collected by him. Such nomination, election, and appointment were not limited to any particular period, but were made generally, and security was, according to the said statute, taken for the faithful execution of the said office, by a bond with sureties made to the then church-wardens and overseers of the poor of the said parish, which said bond, and the condition thereof, are of the tenor and effect following, that is to say: "Know all men by these presents, that we, John Shadrack Piercy, of East Retford, in the county of Nottingham, surveyor, (naming the other sureties,) are jointly and severally held and firmly bound to William Mee and John Smith, the church-wardens, and William Baker, William Wilkinson, William Cart Plant, and Richard Watson, the overseers of the poor of the said parish of East Retford, in the sum of 200*l.*," &c. This bond was dated the 8th of July, 1843. The condition was: "Whereas in and by an act of parliament made and passed in the fifty-ninth year of the reign of his late Majesty George the Third, intituled 'An act to amend the acts for the relief of the poor,' after giving certain provisions and authorities for the nomination and election of select vestries in manner as therein mentioned, it was enacted, that it shall be lawful for the inhabitants of any parish in vestry assembled, to nominate and elect, and afterwards for two justices to appoint, any discreet person or persons to be assistant overseer or overseers of such parish, with such salary and under such regulations as in the said act are directed, and that it shall be lawful for the inhabitants of any parish, upon the nomination and election by them of any assistant overseer or overseers, to require and take security for the faithful execution of his or their office, by bond, with or without surety or sureties, and in such penalty as they shall think fit, and every such bond shall be made to the church-wardens and overseers of the poor, and may, on any breach of the condition thereof, be put in suit by and in the name of the church-wardens and overseers of the poor for the time being, by the direction of the vestry or select vestry, for the benefit of the parish, in manner as therein mentioned." It then recited that "John Shadrack Piercy hath been duly elected, nominated, and appointed assistant overseer of the said parish of East Retford, and under and by virtue of the powers of the said act of parliament," and the defendant and the other persons agreed to become sureties for him for the due execution of his office. And then it provided, "That if Piercy shall from time to time, and at all times during the continuance of his said appointment, or of any future appointment

or appointments, make out the receipt from the rate-books of such parish, and well and faithfully collect and get in all such rates and other sums of money as he may be directed to demand and obtain by virtue of his said office, and do also relieve all vagrants, and make such other payments out of the moneys he shall so receive, as he may be directed by the overseers for the time being of such parish, and of the vestry or select vestry thereof, and do execute all orders of payment relating to or concerning the said parish, and do from time to time, and at all times when required by the said overseers for the time being, or vestry, or select vestry, render a just and true account or accounts of all moneys received or expended by him to the person or persons duly authorized to receive the same, and pay over to him or them any balance that may be found due on such account or accounts, and do also faithfully and diligently execute his said office of assistant overseer in every other respect according to the several directions, provisos, and regulations of the said recited act, or any law or laws relating to the poor referred to, or since passed or enacted, then the within written obligation shall be void, or else shall be and remain absolute." The said bond was duly executed by the said William Newton, the defendant in this action, and by the other parties named in the said bond as obligors. The duties to be executed by the said John Shadrack Piercy, under and according to his said nomination, election, and appointment were such duties as are mentioned in the condition of the said bond, and for performance of which the said bond is conditioned. The said John Shadrack Piercy, immediately after the execution of the said bond, entered upon his said office of assistant overseer of the poor of the said parish, and except so far (if at all) as his appointment of overseer hereinafter mentioned may have put an end to his being assistant overseer, thenceforth continued to act as in execution of such office until the month of March, 1852, when he sent a notice in writing to the vestry of the said parish, purporting to be a resignation of the said offices. The said John Shadrack Piercy, from the time of the said appointment until the sending in such notice of resignation as aforesaid, received the said yearly salary. In the year 1849, the said John Shadrack Piercy, being duly qualified, was in due form of law appointed to be one of the overseers of the poor of the said parish, and he was afterwards, in like manner, from year to year, re-appointed such overseer of the poor until the year 1852, and acted as such during all that period. In the annual accounts kept by the overseers, and audited pursuant to the orders of the Poor Law Board during the years when the said John Shadrack Piercy was so appointed and served as overseer as aforesaid, the salary of the said John Shadrack Piercy, as assistant overseer, was regularly charged and allowed, and the same was regularly received by him until his said resignation of the latter office; and the said John Shadrack Piercy, after he had been so appointed overseer, continued personally to collect the rates, and do the several other acts described in the condition of the bond as the duties of the assistant overseer in the same manner as he had done before such appointment without the

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interference of his co-overseers. In the year 1852, after the said resignation of the said John Shadrack Piercy, as such assistant overseer, it was discovered that a certain balance was due from him on account of rates and moneys collected and received by him, in and by virtue of his said office of assistant overseer before the time of his said appointment as one of the overseers of the poor of the said parish, and not duly accounted for or paid over, pursuant to the condition of the said bond; and that a certain other balance was due from him on account of the like rates and moneys collected and received by him as aforesaid, after his said appointment as one of the overseers of the poor of the said parish, and before his said notice of resignation of the said office of assistant overseer, and not duly accounted for or paid over pursuant to the said condition. And the present action was brought to recover the amount of both such balances against the defendant as one of the sureties in the said bond. The balance so due from the said John Shadrack Piercy, on account of the said rates and moneys collected and received by him before he was appointed one of the overseers of the poor of the said parish has been paid into court by the defendant to the plaintiff since this action was brought, as being recoverable upon and by virtue of the said bond. The defendant contends, that he is not liable under and by virtue of the said bond for the said balance due from the said John Shadrack Piercy, on account of moneys collected and received by him since his appointment as one of the overseers of the poor of the said parish, but admits that he would be liable for the said balance if the said John Shadrack Piercy had not been so appointed, and had not been one of the overseers of the poor of the said parish as aforesaid.

The question for the opinion of the court upon the case above stated was, whether the defendant was, or was not, liable upon the said bond in respect of the said balance of the said rates and moneys so collected and received by the said John Shadrack Piercy after his appointment as one of the overseers of the poor of the said parish, and before the time of his resignation?

Hayes, for the plaintiff. The strict question is, whether Piercy continued to be assistant overseer after 1847. He was so *de facto*, because he continued to perform all the duties, and although he also performed the duties of overseer he was not, in point of law, overseer. The duties of the two officers are quite distinct. The assistant overseer is elected, under the 59 Geo. 3, c. 12, by the vestry, and the appointment confirmed by the justices acting ministerially. He is to continue assistant overseer until resignation or displacement by the inhabitants, and such resignation must be made to the vestry by some formal act. The overseers, other than the church-wardens, are appointed by the justices, subject to an appeal. Then the acceptance of this latter office does not operate as a resignation of the former. The law is fully discussed and laid down in *Rex v. Patteson*, 4 B. & Ad. 9, which established the principle that the acceptance of an incompatible office, though it may beg round for amotion, does not operate as

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an absolute avoidance in those cases where a person cannot divest himself of an office by his own mere act, but requires the concurrence of another authority to his resignation or amotion, unless that authority is privy and consenting to the second appointment. As pointed out in that judgment, if this were otherwise, this anomaly would follow, that a public officer who could not directly resign or be amoved without the concurrence or privity of a superior authority, would be able to accomplish the same object indirectly by an acceptance of an incompatible office. The assistant overseer is not the servant of the overseer, but his duties are distinct, and not merged in those which he would have to perform as overseer. When he was appointed overseer, assuming that his acts as such overseer were valid, he did not receive the rates as overseer, but as a district parish officer. No one overseer collects the rates, but all must be considered to join in collecting. He could not hold both offices, for then he would have to account to himself.

Pashley, for the defendant. The duties of an overseer are various, such as to make rates, to inquire into settlements, to relieve, to make up and pass accounts. None of these are delegated to an assistant overseer, and the acceptance of the duties of the higher office must vacate the lower office. The acceptance of the new incompatible office vacates the former. *Milward v. Thatcher*, 2 Term Rep. 81, and *Rex v. Pateman*, Ibid. 777.

[PARKE, B. How do you answer *Rex v. Patteson* ?]

The distinction between the cases is, that there the office was a corporate office, which the individual had no right to abandon of his own will and pleasure. The assent of the corporation at large, or some select body of it, was requisite, and therefore the surrender of the one office could not be implied from the acceptance of the other; but the assistant overseer could at any time resign, and he does resign, by publicly performing the duties of overseer. The circumstance that he continues to receive the rates is immaterial, for it is not as assistant overseer, but as overseer, that he receives them; and it is settled that a single overseer may act independently of the others. *Morrell v. Martin*, 5 Man. & G. 581. He referred also to *Regina v. Kensington*, 12 Q. B. Rep. 654. The case is the same as if the defendant had been surety for a clerk who had afterwards become a partner, and although he did the same duties as when he was clerk, the surety would be discharged. He cannot be compelled to hold the office of assistant overseer, and his acts show that he has resigned it.

Hayes, in reply. A man cannot resign an office in his own study. He cannot soliloquize a resignation, but must intimate his intention to the persons who grant the office.

[ALDERSON, B. If the assumption of the one office is a public matter, is not that a resignation of the other ?]

The vestry were entitled to know of his resignation before he was appointed overseer. It is not, however, conceded that he ever was

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legally overseer, for the appointment was void because of his holding the other office.

Cur. adv. vult.

The judgment of the court was now delivered by

PARKE, B. (After stating the facts as in the special case, his lordship proceeded): The question is, whether the defendant is liable for breach of duty by Piercy, in the interval between his appointment as overseer in 1849, and his resignation of the office of assistant overseer in March, 1852. It is argued that these are incompatible appointments; and, if they are, the second appointment vacates the first; and, if not, still, the situation of the sureties was altered, and they were discharged as to this part of their liability. In the first place, we are by no means satisfied that they are incompatible offices. We think they are not. When the vestry nominated Mr. Piercy to be assistant overseer, under the 59 Geo. 3, c. 12, s. 7, and the justices appointed him to perform certain of the duties specified in the warrant, the overseers were legally entitled to perform all the remainder; and there is nothing inconsistent with the assistant overseer acting by his appointment and doing the specified duties with a salary, and the regular overseer the remainder. It will be found that there is nothing in the act which obliges the assistant overseer to account to or obey the orders of the regular overseers. He appears to be an independent officer, and his connection with the regular overseers is in name only. But if the offices are incompatible, the question whether the second appointment vacates the first, or itself is void or voidable, depends upon the application of the principle laid down in *Rex v. Patteson*. It was argued at considerable length before us, that the principle was, the acceptance by the holder of one office, of another incompatible one, did not vacate the former, unless the office be such as he could determine by his own act simply, or unless that authority concurred in the new appointment which could accept the surrender of or move from the old one. In such cases only there would be a valid motion or surrender. In this case, the office of assistant overseer was an office to which the vestry could nominate and elect a person; and two magistrates could appoint the person so nominated and elected under the 59 Geo. 3, c. 12, s. 7. The office of overseer of the poor was in the appointment of two justices of the peace, one being of the quorum, under the 43 Eliz. c. 2. The power of motion could be exercised by the vestry only, under section 7, of the former act. In this case, there is no implied motion from the old, by the appointment to the new office; for the authority appointing to that office could not remove; nor any implied surrender, because the same authority could not accept a surrender of the old office. But it was said that this case was within the exception pointed out in *Rex v. Patteson*, inasmuch as any assistant overseer could determine his office by his own act; and if such an office was held at the mere pleasure of the holder and determinable at his will simply, there is no doubt that such an office would be within the exception, and the acceptance of a new and incompatible office

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would be a determination of his will to retain the old one; but, to fall within the exception, the office must be one determinable simply by the act of the holder indicating that he will hold it no longer. If a formal mode of determining the office is established by law, the holder cannot dispense with it of his own mere authority. Now, in this case, the statute, by section 7, provides that the person appointed to be an assistant overseer shall continue in the office until he shall resign, or the inhabitants, in vestry assembled, shall revoke the appointment, and no longer. We think it clear that the resignation here indicated is a resignation to the vestry; a formal notification of the act of giving up the office to which they have nominated him; on which notification they may act, and nominate another to succeed him if they please. The simple will and pleasure of the holder to give up his office is not equivalent to this; and the statute does not contemplate the determination of the office in that mode. We, therefore, think the office of assistant overseer is not determined by the simple act of acceptance of an incompatible office. The offices, however, being, as it is assumed in this part of the judgment to be, incompatible, the appointment is altogether invalid or void, or voidable only. There can be no doubt, that, on that assumption, the appointment of overseer would be vacated on appeal, if it was not void. In either case, the assistant overseership continues. Does, then, the condition of the bond apply to the time when the assistant overseer held both offices, of assistant overseer and overseer? If he acted as overseer, and did all the acts in respect to which he is charged with default in the character of principal overseer, the bond does not apply. But we collect from the case that he still acted in every respect as assistant overseer, and regularly received his salary as such. Then, it is also said that the mode of accounting was altered, and, therefore, during the time he actually held both appointments the surety was discharged. But we do not see that any alteration was made in the mode of accounting by the appointment of Piercy to be overseer. The duties of an assistant overseer in accounting, and in every other respect, are defined in the warrant of appointment, and in this case they are stated to be the same as those specified in the condition. The assistant overseer, by the condition, is to account, not to the overseers; but when required by the "overseers for the time being, or vestry or select vestry, he is to render a just and true account of all moneys received or expended by him to the person or persons duly authorized to receive the same." Who those persons are is not stated in the bond, but he would have to account according to law. And the statute 4 & 5 Will. 4, c. 76, s. 47, then in force, contains provisions on this subject for accounting once a quarter, and where the Poor Law Commission was in force as often as they shall require, to the guardians, auditors, or other person appointed by them. By the 7 & 8 Vict. c. 101, s. 32, commissioners may combine parishes and unions for auditing accounts, and require auditors to be elected; but we cannot find any act which directs an assistant overseer to account to the regular overseers. The only alteration as to accounting that the appointment of assistant overseer to be overseer makes is, that, as over-

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seer, he would be less likely to concur with the other overseers, of whom the others would always be a majority, in calling himself to account. But this, we think, is much too remote a contingency to affect the liability of the sureties. As well might it be said that a diminution in the number of overseers (which the magistrates might, in their discretion, make) would lessen the chance of being called on to account, and so discharge the sureties. Besides, the change is made not by the obligee of the bond, but by the justices. Therefore, we are of opinion that the plaintiffs are entitled to recover.

Judgment for the plaintiffs.

MAWSON v. BLANE.

June 30, 1854.

Bill of Exchange — Infant — Ratification.

The defendant having, whilst an infant, accepted a bill of exchange, was applied to after he became of age, on behalf of the holder, and then wrote to him as follows: "Your brother tells me you are very uneasy about the 500*l.* bill drawn by Mr. P. upon me. Pray, make yourself easy about it, as I will take care that it is paid, and Sir Henry P. comes to England in June": —

Held, per PARKE, B., and ALDERSON, B., that this was not a ratification to take the case out of the statute 9 Geo. 4, c. 14; but, per PLATT, B., and MARTIN, B., that it was a ratification.

Assumpsit by the indorsee of a bill of exchange, for 500*l.* against the acceptor.

Plea — Infancy.

Replication — A written ratification by the defendant after he became of age. Issue thereon.

At the trial, before Parke, B., at the Sittings for Middlesex, in Easter term, it appeared that the bill of exchange was drawn by Mr. Pottinger upon the defendant, and accepted by him. Mr. Pottinger was the son of Sir H. Pottinger, who was at that time abroad. Application was made by the plaintiff's brother to the defendant for payment, who stated that the plaintiff was uneasy about the bill, upon which the defendant gave a verbal assurance that it would be paid. The plaintiff's brother then desired the defendant to write it down, and he wrote a letter in these terms: —

"Dear Sir: Your brother tells me you are very uneasy about the 500*l.* bill, drawn by Mr. Pottinger on me. Pray, make yourself easy about it, as I will take care that it is paid, and Sir Henry Pottinger comes to England in June. Yours, faithfully, S. BLANE."

This letter was treated as a ratification, and the defendant arrested

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on a *capias*, on the 24th of February, he being about to proceed abroad with his regiment. Bail was given, and at the trial the letter was relied on as a ratification, but the learned judge ruled that it was not, and the defendant had the verdict, with leave to the plaintiff to move to enter it for him.

A rule *nisi* was accordingly obtained, against which

James and *Hawkins*, now showed cause.¹ The letter is no ratification of a debt incurred while the defendant was an infant, but a mere declaration that the defendant considered himself bound, as a man of honor, to see that the plaintiff did not lose his money. There is no express admission of an existing debt coupled with an unconditional promise of payment. At the most, it is but a guarantee that he would pay it if Sir Henry Pottinger, on his return, did not do so.

Quain, in support of the rule. The letter was a ratification within the principle laid down by this court in *Harris v. Wall*, 1 Exch. Rep. 122. Had the bill been accepted by a person on behalf of an adult, and this letter written, it would have amounted to an adoption of the agency. It is not requisite that the letter should amount to a fresh promise. The letters in the case just cited, were less strong than the present, for the phrases used were, "the matter will be settled shortly," "will be shortly paid," &c. The whole tenor of the letter was to satisfy the plaintiff that he would be paid, and that could only be because the defendant made himself liable.

Cur. adv. vult.

June 28. The learned Barons, differing in opinion, now delivered their judgments.

PARKE, B. The question in this case was, whether a letter that was written by the defendant, after he came of age on the 22d of February, was a sufficient ratification of a promise made whilst he was an infant, to satisfy the statute of the 9 Geo. 4, c. 14. That depends entirely upon the construction of the letter. [His lordship then stated the facts.] Now, to take the case out of the statute, there must be either a promise by the defendant in writing after he came of full age, or a ratification of the prior contract. The term "ratification," has already had an interpretation given to it in *Harris v. Wall*; and there it was held, that a ratification means such a ratification as would make a person liable as principal for an act done by a third person in his name. I take the meaning of "ratification" to be different from a promise. It is an admission that he is liable, and bound to pay that debt on a contract which he made when an infant; therefore, in order to bring the case within Lord Tenterden's Act, there must be an admission in writing, that he was liable to pay on that contract which

¹ June 27, before PARKE, B., ALDERSON, B., PLATT, B., and MARTIN, B.

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he made when he was a minor; that is, he was liable to pay, and bound to pay his acceptance, bound to pay *in præsenti* the acceptance, when due. Now, so understanding the meaning of the term "ratify," I was of opinion at the trial, and I still continue to be of the same opinion, that this letter does not amount to a sufficient acknowledgment of his liability as acceptor of the bill; it is only an assurance. A man might consider himself in honor bound to pay the bill, and it is an assurance that the bill would be paid, not a recognition of being bound to pay by virtue of that bill. The terms of the letter are: "Your brother tells me;" I will repeat this again: "Your brother tells me you are very uneasy about the 500*l.* bill; pray make yourself easy about it, as I will take care that it is paid." Not, "Make yourself easy about it; you are sure it will be paid, because I am liable as acceptor;" but, "I will take care that it is paid," that is, he means to give an assurance that some party will pay it. It is clear who he means to be the party to pay it, certainly the drawer of the bill, and that the means of payment are to come from Sir Henry Pottinger; and he assures the plaintiff that it will be paid, and that Sir Henry Pottinger will come to England in June; he points to him as the source from which payment is to be derived. My opinion was at the trial, and still is, that this is really not any admission that he is liable as principal in virtue of that bill of exchange, that is, as principal, liable to pay the debt. It amounts to nothing more nor less than an assurance, that the plaintiff may be calmed in his feelings on the assurance that this bill will be sure to be paid, and points to the arrival of Sir Henry Pottinger in England, in June. I think the rule ought to be, therefore, discharged.

ALDERSON, B. I am of the same opinion. I do not think this letter a ratification at all. It seems to me that the party did not intend by this writing to make himself any more liable than he was before. He was not liable before as an acceptor, because he accepted the bill when he was an infant. He says Mr. Pottinger, who drew the bill, was liable, and he meant to leave him so. I think he meant, also, to continue himself as honorably bound, and so he will remain, to pay this bill, if Mr. Pottinger did not do so. It was probably for Mr. Pottinger's benefit altogether, according to the probable statement of the evidence; and he intended to induce Mr. Pottinger to pay that bill, which he was bound in law to do; and he represented to this party, that he thought he would probably be able to do it as soon as his father, Sir Henry Pottinger, returned. All that this letter seems to me to mean is: "I will use my influence with Mr. Pottinger to get him to pay the bill; and I state to you further, that I think he will be able to do it by the kindness of his father."

PLATT, B. I entertain a different opinion from my learned brothers who have delivered their judgment. It strikes me, that this is a ratification of the original contract. The words are certainly consistent with that construction. He says: "I will take care that it is paid." What was the defendant? He was the acceptor. He was primarily liable

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on this document. When a man is primarily liable on a document, and he says: "I will take care that it is paid," surely, the necessary inference is: "I will take care and see that the contract is performed." It strikes me that that is really the meaning of the phraseology of the letter. But, even if he was secondarily liable, I say it is enough; because, if he was to be secondarily liable, because he had accepted for the accommodation of another party, and stood in the relation of drawer; still, he undertook to see the thing done. Translated in that form, that is the case. Therefore, it strikes me, I own, that it is a ratification of this contract. But, however, I must say I am not at all sorry that I am in a minority, or apparent minority, here, because, if the judges are divided in opinion, nothing will be done on this rule; it will stand as it does. I must say the manner in which this young gentleman was entrapped into giving this letter, without being told he would be arrested the next day through giving it, does not encourage me to entertain feelings very favorable to the present plaintiff; but still, it is my duty to pronounce my decision according to my opinion of the law. It seems this was manœuvred out of him on the 22d of February, and on the 23d, he was arrested, and, of course, bail was found, otherwise he would have lost his commission: he was going abroad. That is a trick which takes place every day, not to be very much approved of; and, it seems to me that justice will ultimately be done in this case, provided the court allows, as I think they ought to allow, a nonsuit to be entered, instead of a verdict,—because, then the plaintiff may bring his action again, and will be able to tender a bill of exceptions, otherwise he would lose that benefit which I really think he ought to have. It seems to me, therefore, that this rule ought to be made absolute.

MARTIN, B. My opinion is, also, that this rule ought to be made absolute. My reason for that judgment is, that the case of *Harris v. Wall*, is a weaker case than this is; and if *Harris v. Wall* be law, in my judgment, this rule ought to be made absolute. Perhaps if I had to decide on this point *de novo*, I should not agree with all that is stated in *Harris v. Wall*. I cannot think that the definition of "ratification" is what is stated. I apprehend a ratification is an undertaking by a person after he becomes of full age, and expresses that, notwithstanding he is aware that the contract which he entered into when an infant, is void, he nevertheless is willing to affirm it and treat it as valid; that is my notion of a ratification. It seems to me that the word itself expresses that, and that is its real meaning; but I adopt the judgment of the court in *Harris v. Wall*, and, according to the best judgment I can form, as this is a stronger case than that, I think I ought to act upon that decided case, and that the rule should be made absolute.

PARKE, B. That being so, the court being equally divided, the rule drops altogether.

Rule dropped.

Sanderson v. Proctor.

SANDEYSON v. PROCTER.

June 15, 1854.

Practice — Appeal from Judge at Chambers — Affidavits.

Where a judge declined to make an order to give the plaintiff his costs under the County Courts Act, 13 & 14 Vict. c. 61, s. 13, and an application is made to the court, fresh affidavits may be used in addition to those made use of before the judge.

In this case, an application had been made to Alderson, B., at chambers, for an order to give the plaintiff his costs under the 13 & 14 Vict. c. 61, s. 13, on the ground that the superior courts had concurrent jurisdiction with the county court, over the cause of action. The order was refused; and a rule *nisi* had been obtained, calling on the defendant to show cause why the plaintiff should not have his costs; against which

Quain now showed cause,¹ and was proceeding to read an affidavit which had not been used at chambers, when

Lush objected, on the ground that it was an appeal from the judge at chambers, and no fresh affidavits could be used; the question being whether the decision was correct according to the materials before the judge.

[MARTIN, B. In *Gibbons v. Spalding*, 11 Mee. & W. 173, fresh affidavits on both sides were allowed, where an application was made to rescind an order of the judge for a *capias*, under 1 & 2 Vict. c. 110.]

That was upon the words of the particular statute.

BY THE COURT. The affidavit may be used. The object of the court is to ascertain the truth of the facts alleged.

The rule was then argued upon the merits, and finally made absolute.

*Rule absolute.*²

¹ Before POLLOCK, C. B., PARKE, B., ALDERSON, B., and MARTIN, B.

² See now, 17 & 18 Vict. c. 125, as to the use of additional affidavits on the hearing of any motion.

 Place v. Potts.

IN THE EXCHEQUER CHAMBER.

PLACE v. POTTS and another.¹

June 7, 1854.

Shipping — Action for Freight — Payment of Freight into Admiralty Court on Monition — Jurisdiction of Court of Admiralty.

To an action for freight, the defendants pleaded in bar of the further maintenance of the action, the hypothecation of the ship and freight by the master, a suit in the Admiralty Court by the obligee of the bottomry bond, a monition commanding them to bring the freight into that court, and that the freight had been paid in by them pursuant to the monition : —

Held, that the plea was a good answer to the action, as the Court of Admiralty had jurisdiction to decide upon all claims to the freight so paid into court, made by any of the parties to the suit before it.

THE Court of Exchequer having given judgment for the defendant on a demurrer to a plea, the plaintiff brought a writ of error.

The pleadings are stated in the report below, 22 Law J. Rep. (n. s.) Exch. 269; s. c. 20 Eng. Rep. 505.

June 16. *Watson*, for the plaintiff in error. The judgment below is wrong. The proceedings in the Admiralty Court are no bar to the present action. The plaintiffs here are no parties to the suit in the Admiralty Court. They are merely monished to bring in the proceeds of the wreck, not to appear to the suit. A judgment in the Admiralty Court being a judgment *in rem*, no doubt might have been pleaded in bar. Story's Conflict of Laws, par. 592. But the mere pendency of a suit cannot, for it cannot be predicated how the suit will be determined. Probably the Court of Admiralty, or a court of equity would restrain the plaintiff from enforcing his judgment, if the defendants would otherwise have to pay the freight twice. There is no direct authority on this point. In *Harmer v. Bell*, 7 Moore, P. C. 267, it was held, that proceedings *in personam* in one court could not be pleaded in bar to a proceeding *in rem* in the Admiralty Court. A foreign attachment cannot be pleaded as an answer to an action, unless it takes place before the action was commenced. *Babington v. Babington*, Cro. Eliz. 157; *Humphrey v. Barns*, Ibid. 691; and *Webb v. Hurrell*, 4 Com. B. Rep. 287.

[CRESSWELL, J. The question is, how far the Admiralty Court can deal with the money paid in.]

The Court of Admiralty cannot do complete justice like a court

¹ *Coram* COLERIDGE, J., MAULE, J., WIGHTMAN, J., CRESSWELL, J., ERLE, J., WILLIAMS, J., CROMPTON, J., and CROWDER, J.

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of equity. *Duncan v. M' Calmont*, 3 Beav. 409; and *The Guardian*, 3 Rob. 93. Prior to the statute 3 & 4 Vict. c. 65, the admiralty had no power to deal with title to freight. *Haly v. Goodson*, 2 Mer. 77. And that statute does not, it is submitted, give it any such power. It is true, Dr. Lushington, in *The Dowthorpe*, 2 W. Rob. 365, says, that the statute virtually confers on that court such a power, but that proposition is not supported by any decided authority. The plea is bad for this further reason, that it does not allege that the holder of the bottomry bond had any right to sue in the Admiralty Court. It does not allege that the ship arrived in port, though that was necessary to give the holder of the bond any right whatever to recover on the bond.

[CROMPTON, J. The Admiralty Court had jurisdiction to decide whether the ship arrived or not.]

Bramwell, for the defendants. The defendants have been compelled to pay the freight into the Admiralty Court, and if the plaintiff, in that court, recovers in the suit there, he never will be able to get his money again. After satisfying the claim of the holder of the bottomry bond, the surplus of the freight, if any, will be paid over to the plaintiff in this action, for the Admiralty Court has authority to do, and will do, complete justice with respect to the funds in its control. This is confirmed by the opinion of Dr. Lushington, in *The Dowthorpe*. The Court of Admiralty exercises the jurisdiction alleged.

Watson replied.

Cur. adv. vult.

The judgment of the court was now delivered by

COLERIDGE, J. This was an action for freight, and the defendants pleaded in bar of the further maintenance of the action as to 386*l.* 17*s.* 9*d.*, parcel of the money claimed, the hypothecation of the ship and freight by the master, a suit in the Admiralty Court by the obligee of the bottomry bond, a monition commanding him on or before a day named to bring into the registry the said money due for the freight, to abide the judgment of the court concerning the said bond, or to appear and show good cause to the contrary, and, further, to do and receive as unto law and justice should appertain; and being unable to show any such cause, they did, in obedience to the monition, after the commencement of the action, and were forced to pay into the registry the said sum of money, to abide the judgment of the court. To this plea there was a general demurrer, and in the court below judgment passed for the defendants, and, as we think, properly. It cannot be disputed that the Court of Admiralty had authority to compel the defendants to pay into the registry, to abide its judgment on the bottomry bond, the amount due for freight, being the very sum sought to be recovered in this action. The jurisdiction of the court in this respect is perfectly well established, and its nature well known. The suit is not merely against the person of the ship

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or freight owner, or consignor, or consignee of the goods, but against the things themselves, the ship, or the freight, as the case may be, this latter being treated not as a *chose in action*, but *in esse*, and represented by the money which is to be paid. These, then, being brought into the registry, and under the dominion of the court, are there subject to its judicial disposition, in the first place, for the purposes of the matter immediately in issue, the claim, namely, of the obligee of the bottomry bond. There may, or there may not be a surplus after satisfying that claim; but the jurisdiction would be extremely imperfect if, in the second place, on the supposition of there being a surplus, the court had not power to deal with that also, to the extent, at least, of deciding on the claims to it of all the parties who are before it. It is unnecessary to extend this to those who may claim under them, and are not before the court. These, whether assignees, in case of a bankruptcy, or claiming in any other way, will not be prejudiced in their rights of action by this adjudication by the court, on the claims of those who are before it. This jurisdiction, which seems to grow almost necessarily out of the admitted nature of the suit *in rem*, we find, by the information communicated in the court below to the very learned judge of the Admiralty Court, to be, in fact, exercised, and we think it unnecessary to have recourse to the statute of Victoria, mentioned in the argument, in order to support the jurisdiction. In this view of the case, the plea seems to be a clear answer to the action; the very subject-matter, on which the plaintiff's claim in this suit rests, has, by a competent authority, been taken out of the hands of the defendants and paid into the registry, to abide the disposition of the court in the suit there. The plaintiff himself is also before that court, in the same suit, and will receive from it whatever he is ultimately entitled to from the defendants. This, then, is in fact a payment to him, and it would be a manifest injustice if, at the same time, he could, in this court, compel the defendants to pay the money over again to him. He, by his agent, has borrowed and had the benefit of the money raised by the bottomry bond; by that advance, in fact, the freight has been earned, and that advance the plaintiff has not repaid. He cannot, therefore, complain of this effect being given to the admiralty proceedings. The judgment of the court below must be affirmed.

Judgment affirmed.

Bishop v. Wraith.

BISHOP v. WRAITH.¹

November 7, 1853.

*Tenancy, when it commences under a Written Agreement in the
Absence of Express Provision.*

In the absence of any evidence to the contrary, the tenancy under a written agreement for the hire of premises at a yearly rental, from year to year, must be taken to begin from the day on which that agreement professes to have been executed; and that question is for the judge and not for the jury.

MR. BRAMWELL moved for a new trial on the ground of misdirection by Pollock, C. B., at the last Kent Assizes, when a verdict passed for the plaintiff for 4*l.* 14*s.* 6*d.* The declaration contained a count in trespass, a count for an irregular and excessive distress, and also a count for money had and received. On the latter, the plaintiff recovered a verdict for 4*l.* 14*s.* 6*d.*; and, on the other counts, the jury found against him, under the direction of the learned judge. The plaintiff had taken a farm from the defendant, and the question was, whether the tenancy existed at the time when the defendant committed the trespass complained of by putting in a distress warrant. The plaintiff came into the farm under a written agreement, dated 29th October, 1851, at a rent of 300*l.* per annum, payable half-yearly; but the agreement was silent as to the commencement of the term. The plaintiff contended that his tenancy began at old Michaelmas day, and in proof of that, showed that the defendant had actually given him a notice to quit on that day, though he had subsequently withdrawn it on the ground that it was a mistake, and that the tenancy began on the 29th October. The plaintiff also relied on the fact that, when he entered upon the farm, he paid the defendant for the tillage from the 11th October (when the old tenant went out) to the 29th October. The defendant, on the other hand, contended that the tenancy did not begin till the 29th October, and appealed to the date of the agreement in support of that contention. The Chief Baron was of opinion, with the defendant, that, as the agreement bore that date, and contained no express statement of the time when the tenancy was to begin, the tenancy must be taken to have begun on the 29th October, and he thereupon directed the jury to find for the defendant on the count in trespass.

Bramwell now contended, that the date of the commencement of the tenancy was a question of fact for the jury, and not for the judge; and that, though the agreement professed to have been executed on the 29th October, it might well be, as was often the case, that it was really executed on another day; and that, as the defendant had himself given a notice to quit on the 11th October, and the plaintiff had

¹ *Coram* POLLOCK, C. B., PARKE, B., ALDERSON, B., and PLATT, B.

Bishop v. Wraith.

paid him tillage from the 11th October to the 29th, the strong probability was, that the plaintiff was correct, and that the tenancy did not commence on the day when the agreement bore date.

SED PER CURIAM. In the absence of parol testimony to explain the agreement, and show that the parties meant the tenancy to begin at a different time, the date, on which the agreement professes to have been executed, was correctly taken, by the learned judge, to be the commencement of the tenancy. The agreement, in effect, says, that, on the 29th October, the plaintiff took a farm from the defendant from year to year, at a certain rent, payable half-yearly; and, till the contrary be shown, as was not the case here, the parties must be taken to have contracted on that day for a letting as from that day. The direction of the Chief Baron, on this point, was quite correct, as it was his duty to construe the agreement; and the defendant was justified in putting in a distress for rent, due up to the 29th October. There can, therefore, be no rule.

Rule refused.

CROWN CASES
RESERVED FOR THE CONSIDERATION AND DECISION
OF THE
COURT OF CRIMINAL APPEAL;
DURING THE YEAR 1854.

REGINA v. GEORGE FEATHERSTONE.¹

June 3, 1854

Larceny—Avowterer—Delivery by Wife of Husband's Goods.

Delivery by the wife of her husband's goods to her adulterer, he having knowledge that she had taken them without her husband's authority, is sufficient to support an indictment for larceny against the adulterer.

Where a case was reserved for the Court of Criminal Appeal, and the judge before whom it was tried died before it was signed, the court directed it to be signed by the other judge, who was in the commission.

THIS case had been tried before the late Mr. Justice Talfourd, who died before it had been signed by him, according to the 11 & 12 Vict. c. 78, s. 2. Upon application to the court on a former occasion, (April 29,) for its direction under the circumstances, the court directed that it should be signed by the learned judge (Mr. Justice Wightman) who had been in the commission with Mr. Justice Talfourd. The case was as follows: The prisoner, George Featherstone, was tried at the last Assizes at Worcester. The indictment charged him with stealing twenty-two sovereigns and some wearing apparel. It appeared that the prosecutor's wife had taken from the prosecutor's bedroom,

¹ *Coram* Lord CAMPBELL, C. J., ALDERSON, B., COLERIDGE, J., MARTIN, B., and CROWDER, J.

Regina v. Featherstone.

thirty-five sovereigns, and some articles of clothing, and that when she left the house, she called to the prisoner, who was in a lower room with the prosecutor, and other persons, and said: "George, its all right; come on." The prisoner left in a few minutes afterwards. The prisoner and the wife were afterwards seen at various places, and eventually traced to a public-house, where they passed the night together. When taken into custody, the prisoner had twenty-two sovereigns upon him. The jury found the prisoner guilty, stating that they did so "on the ground that he received the sovereigns from the wife, knowing that she took them without the consent of her husband." Whereupon, the judge respited the judgment, admitted the prisoner to bail, and reserved for the opinion of the Court of Appeal, the question, whether a delivery of the husband's goods by the wife to the adulterer, with knowledge by him that she took them without her husband's authority, was sufficient to maintain the indictment for felony against him.

No counsel appeared on either side.

LORD CAMPBELL, C. J. We are clearly of opinion that the conviction is right. The general rule of law is, that a wife cannot be guilty of larceny if she takes her husband's goods. There is, legally, no taking, because they are one person in the eye of the law. But the rule is subject to this qualification — if she commit adultery, she has determined her quality of wife, and has no longer any property in her husband's goods. The prisoner is to be considered in the same position as if he had taken the goods. If the wife commit adultery, and take her husband's goods, and deliver them to the adulterer, it is felony in him, because no consent of the husband can be presumed. It is a stealing by the prisoner, who is not at liberty to avail himself of the consent of the wife, as showing the consent of the *dominus* of the goods. The case comes within the express authority originally laid down in Dalton,¹ and repeated in every text-book.

ALDERSON, B. It is not clear that the adulterous wife may be convicted, but he who receives from the adulterous wife may be convicted.

Conviction affirmed.

¹ Dalton's Just. Peace, 853; and see 1 Russ. Cr. 28, by Greaves, 3d ed.

Regina v. Larkin.

REGINA v. DENNIS LARKIN.

June 3, 1854.

Pleading — Scienter — Amendment.

A count for receiving stolen goods alleged that the prisoner received the goods of A. B., "he, the said A. B., then knowing them to have been stolen." After a verdict of guilty, the counsel moved in arrest of judgment, on the ground that the *scienter* was omitted; but the court amended the count, by striking out "A. B.," and substituting the name of the prisoner:—

Held, first, that the count was bad as it was originally framed.

Secondly, that the objection was taken at the proper time.

Thirdly, that the indictment was not amendable after verdict.

The court ordered the record to be restored to its original state.

DENNIS LARKIN was indicted at the quarter sessions at Pontefract, in the first count, for stealing, on the 3d May last, at Sheffield, six pounds weight of steel, the property of Abram Brooksbank; and the indictment contained a second count, which was in the following words: "And the jurors aforesaid, on their oath aforesaid, do further present, that the said Dennis Larkin, afterwards, to wit, on the same day and year aforesaid, with force and arms, at the parish of Sheffield aforesaid, in the riding aforesaid, the same six pounds weight of steel, of the goods and chattels of the said Abram Brooksbank, then lately before feloniously stolen, taken, and carried away, then and there feloniously did receive, he, the said Abram Brooksbank, then and there well knowing the said last-mentioned goods and chattels to have been feloniously stolen, taken, and carried away" — (concluding *contra formam statuti*.) On the trial, no evidence was offered on the first count, but a verdict of guilty on the second count was returned, the error not having up to that time been observed by the court. After the verdict had been recorded, the counsel for the prisoner moved that the judgment should be arrested, on the ground that the indictment did not allege any guilty knowledge in the prisoner. The counsel for the prosecution argued, first, that as the objection had not been brought to the notice of the court, by demurrer or otherwise, before the jury had given their verdict, the counsel for the prisoner was not at liberty to move in arrest of judgment at the time when he did so move. Secondly, that the second count was good, it being allowable to reject the words "the said Abram Brooksbank" as surplusage; for which he cited *R. v. Morris*, 1 Leach's C. C. 109, 4th ed. Thirdly, that the indictment might be amended. The court was of opinion that the count was good as it stood, but they amended the indictment by striking out "Abram Brooksbank," and substituting for them the words "Dennis Larkin" between the words "he, the said," and the words "well knowing," in the second count, so that it correctly alleged a guilty knowledge in the prisoner; and sentence was passed upon him, subject to the

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opinion of the Court of Criminal Appeal on the following questions: First, whether the prisoner's counsel was at liberty to move in arrest of judgment at the time when he did move? Secondly, whether it was not allowable to reject the words "the said Abram Brooksbank" as surplusage, so that the second count was good as it originally stood? Thirdly, whether the court had power to amend the indictment in manner above stated? Fourthly, if the conviction is bad, whether a fresh indictment, correctly alleging the guilty knowledge, will lie against the prisoner?¹

LORD CAMPBELL, C. J. By the 14 & 15 Vict. c. 100, s. 25, every formal defect may be amended, and then the trial is to proceed as if no such defect had appeared. The real questions in this case are, first, whether the want of a "*scienter*" is merely a formal defect; and, secondly, if so, whether the indictment could be amended after verdict.

Hall, for the Crown, admitted that he could not argue in support of the case upon those grounds, but only upon the ground that the name of the prosecutor in the second count might be rejected as surplusage; citing *R. v. Morris*.

Heaton, for the prisoner, contended that that case was distinguishable from the present one.

LORD CAMPBELL, C. J. How can the name be struck out? The next antecedent to which the word "he" refers would still be the prosecutor, and not the prisoner. In *R. v. Morris*, it was a mere misnomer; the party was rightly described as to his surname, but not as to his Christian name. The objection here was taken at a proper time, and the court had no power to amend. After verdict the amendment was a nullity, and the record should be restored to the same state as it was before the amendment.

*Conviction quashed.*²

¹ After delivering judgment, the court answered this question in the affirmative, stating that the prisoner could not be indicted again for stealing, but might be for receiving.

² The court intimated an opinion that the prisoner might be indicted again for the receiving, although not for the stealing. In this case, ALDERSON, B., reprobated the practice of setting out all the preliminary proceedings not material to the real questions intended to be raised, and said that the cases should be seen by the counsel previously to their coming before the court.

Regina v. Pratt.

REGINA v. DAVID PRATT.

June 3, 1854.

Larceny — Assignment for Creditors — Bailment.

The prisoner assigned his goods to trustees for the benefit of his creditors; but before the trustees had taken possession, and while the prisoner remained in possession of them, he removed the goods, intending to deprive his creditors of them. The jury found that the goods were not in his custody as agent of the trustees: —

Held, that he was not guilty of larceny.

THE prisoner, David Pratt, was tried at the last January Sessions for the borough of Birmingham, for having stolen, on the 18th May, 1853, one die lathe, the goods of Edward Barker and another, and on the 19th May, in the same year, two lathes, the property of the said Edward Barker and another, and was found guilty. The prisoner was a thimble-maker and manufacturer, carrying on his business in two mills, one a thimble-mill, and the other a rolling mill, in the said borough, and before the occurrences hereinafter mentioned he was the owner and proprietor of the property mentioned in the indictment. On the 14th May, 1853, the prisoner, being in pecuniary difficulties, arranged with the prosecutors, Edward Barker and William Wayte, creditors of the prisoner, and with Mr. Collis, an attorney, who acted on their behalf, to execute an assignment to trustees for the benefit of his creditors; and on the 18th May a deed of assignment was executed by him, whereby the prisoner assigned to the prosecutors, as trustees, for the purposes therein mentioned, "all and every the engines, lathes, rolls, boilers, furnaces, horses, carts, machinery, tools, and implements of trade, the stock-in-trade, goods, wares, merchandise, household furniture, fixtures, plate, linen, china, books of account, debts, sum and sums of money, and all securities for money, vouchers and other documents and writings, and all other the personal estate and effects, whatsoever and where-soever, save and except leasehold estates of the said David Pratt, in possession, reversion, remainder, or expectancy, together with full and free possession, right and title of entry in and to all and every the mills, works, messuages, or tenement and premises wherein the said several effects and premises then were; to have and to hold the said engines and other the premises unto the said Edward Barker and William Wayte, their executors, administrators, and assigns, absolutely." The deed was executed by the prisoner in the presence of, and was attested by, James Rous, who was a clerk to Mr. Collis, and who was not an attorney or solicitor. On the 19th May the said deed was again executed by the prisoner in the presence of Mr. Collis, and in all respects in conformity with the provisions of the 68th section of the Bankrupt Law Consolidation Act, 1849, with a view of preventing the deed from operating as an act of bankruptcy. The deed had been duly stamped on its first execution, but no second stamp was affixed on its second execution, which omission was made

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the ground of an objection to its receipt in evidence. It was, however, admitted, subject to the opinion of this court, if it became necessary. At the time of the first interview with Mr. Collis, on the 14th May, the prisoner said that he had stopped work altogether; but on the 16th it was arranged between him and Mr. Collis that the rolling business should be allowed to go on, to complete some unfinished work. Mr. Collis then told him to keep an account of the wages of the men employed on the rolling work, and to bring it to the trustees. This the prisoner did on the 19th May, when the wages were paid by the trustees, and the rolling business finally stopped. On the nights of Monday, the 16th May, and of every other day during that week, the prisoner removed property conveyed by the deed, including the articles mentioned in the indictment, from the thimble and rolling mills, some of the heavier machines being taken to pieces for the purpose of removal, and hid them in the cellar and other parts of the house of one of his workmen. Some time afterwards, and after the sale by the trustees of the remainder of the property, a Mr. Walker, who had been a large purchaser at the sale, recommenced the business at the thimble and rolling mills, and the prisoner acted as his manager, when the property, forming the subject of this indictment, was, by the prisoner's directions, brought back at intervals to the mills. No manual possession was taken by the prosecutors prior to the removal from and back to the mills, but the prisoner remained in the possession after the execution of the deed, in the same manner as before. The jury were asked three questions, which were put separately: First, did the prisoner remove the property after the execution of the deed of assignment? Secondly, did he so act with intent fraudulently to deprive the parties, beneficially entitled under the deed, of the goods? And thirdly, was he at the time of such removal in the care and custody of such goods as the agent of the trustees under the deed? And they answered them as follows: First, he did remove the property after the execution of the assignment; secondly, he did so remove it with such fraudulent intent; and, lastly, he was not in the care and custody of the goods as the agent of the trustees. The chairman thereupon (being of opinion that the two affirmative answers would support a conviction, notwithstanding the third answer in the negative) directed the jury to find the prisoner guilty, which they did.

Bittleston, (*Field* with him,) for the prisoner. The general rule applies: "*Furtum non est ubi initium habet detentionis per dominum rei.*"¹ In some cases there may be a constructive possession, as in the instance of master and servant; but in this case there was no trespass, and the property did not draw to it the possession, because that is expressly negatived by the finding of the jury. If this indictment be sustained, every person who removes goods conveyed by a bill of sale may be guilty of larceny.

¹ See *per curiam* in *Regina v. Thurborn*, 2 Car. & K. 836.

Regina v. Samways and Wills.

[LORD CAMPBELL, C. J. In *Regina v. Reed*, 18 Jur. 66; s. c. 24 Eng. Rep. 562, it was decided that there must be a transmutation of possession.]

Wills, for the Crown. The prisoner was bailee, and broke bulk, whereby he determined his possession.

LORD CAMPBELL, C. J. If he had been bailee that would have been so, but the jury have negatived the bailment.

Conviction quashed.

REGINA v. EDWARD SAMWAYS AND JOSEPH WILLS.

June 3, 1854.

Larceny — Asportation — Circumstantial Evidence — Constructive Possession.

The prisoners were charged with stealing four sacks of barley and three sack bags from their master. It was proved in evidence that the prisoners and one B. were employed by the prosecutor to winnow barley which he had mixed with canary seed. One of the prisoners fetched several sacks from the prosecutor's house, which he and B. filled with barley. The two prisoners then sent B. home before the usual time. At twelve o'clock on the night of the same day, the carter went into the stable with a lantern, and shortly afterwards the two prisoners entered the stable. In a few minutes after this the prosecutor saw the carter in the loft above with a lantern, and found the two prisoners concealed under straw in the loft, and then, in a dust-bin in a stable beneath, he found three sacks full of barley mixed with canary seed, which he swore was of the same kind which he had mixed. It was no part of the duty of the prisoners to place the barley in sacks, or to put the sacks of barley into the dust-bin. The jury found both the prisoners guilty:—

Held, that the evidence was sufficient to support the conviction.

THE following case was stated for the opinion of this court, by the chairman of the General Quarter Sessions of the Peace, for the county of Dorset.

At a general sessions of the peace, for the county of Dorset, held at Dorchester, on the 1st day of March, 1854, Edward Samways and Joseph Wills were tried before myself and others for having, whilst servants to one John Scutt, feloniously stolen, on the 14th of February last, four sacks of barley and three sack bags, the property of the said John Scutt, their master. A second count also charged them with feloniously receiving the same.

The evidence, on the part of the prosecution, was substantially as follows: "The two prisoners, with a girl, named Emily Burden, were employed on the 14th of February, 1854, by John Scutt, the prosecutor, to winnow some barley in his barn, and, having reason to suspect that some of his barley had been taken away, the prosecutor mixed about a pint of canary seed with the barley in the barn, on the said 14th of February, before the two prisoners began to winnow the

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same; and, during the afternoon of this day, one of the prisoners, namely, Edward Samways, was seen to enter the prosecutor's house and bring away several sacks from that house into the barn, and, then, he and Emily Burden filled these sacks with the barley. The prisoners then told Emily Burden that she might go home, although the usual hour of her leaving work had not quite arrived. At twelve o'clock, on this same night, the prosecutor, John Scutt, and his brother, Robert Scutt, placed themselves to watch the barn and the stable, and first saw William Bowring, the carter, enter the stable, with a lantern in his hand; and, soon after this, they distinctly saw the two prisoners enter the stable also. In about three minutes after this, the prosecutor also entered the stable, but found no one there; but, upon his calling out, the said William Bowring answered from the loft, which is above the stable; and, upon the prosecutor's going up a sort of ladder through the rack into the loft, he saw William Bowring there with a lantern, and then, upon moving some straw with a pike, he found the two prisoners concealed under the straw. No barley and no sack were found in the loft; but, upon the prosecutor's going down from the loft into the stable, there and in a bin, or dust-coop, which was in an aperture of the wall between the stable and the barn, the prosecutor found three sacks full of barley, and that barley, upon examination, was proved to have canary seed mixed with it. The prosecutor, John Scutt, swore to his barley, (samples of which were produced in court,) not merely from the barley being of the same kind and species as the barley which he had in his barn, but especially from the fact that the canary seed, which was found in the barley taken from the barn, was also found in the three sacks of barley, which were found in the dust-bin in the stable. The prosecutor, John Scutt, also swore, that it was no part of the duty of the prisoners to place the barley in sacks, and that he had never desired them to do so, least of all to place the sacks containing barley in the dust-bin in the stable, where the said three sacks of barley were found covered over with dust. In summing up this evidence to the jury, I told them distinctly, that the charges against the prisoners were two-fold, and quite distinct. That, with regard to the first count, which charged the two prisoners with the felonious stealing of the said several chattels, a positive or constructive taking and asportation of the barley, or the bags, one or the other, or both, must be proved, jointly or severally, to have been committed by the prisoners; and that it was for them the said jury to say whether, according to the evidence, the prisoners were proved to have so feloniously taken away and appropriated the barley, or the bags, the one or the other, or both, belonging to the prosecutor. With regard to the second count, which charged the two prisoners with having feloniously received the said four sacks of barley and three bags, well knowing the same to have been feloniously stolen, I most distinctly told the jury that they must be satisfied (according to the doctrine laid down in the case of *Regina v. John Wiley*, as reported in 4 Cox's Criminal Cases, 412; s. c. 1 Eng. Rep. 567,) that there was "an actual or constructive possession" of the stolen chattels by the prisoners, one or both, the question

Regina v. Samways and Willis.

being whether the prisoners were ever seen carrying away the sacks of barley, or any parts or portions of the same: or whether they were ever seen in the same room or place where the three sacks of barley were found by the prosecutor, the evidence showing that, although the two prisoners were seen to enter the stable at twelve o'clock at night, William Bowring was also shown to have entered that same stable, with a lantern, a few minutes before the two prisoners entered that stable; and that the acts imputed to the prisoners, might, by possibility, have been committed by William Bowring. The jury having found both the prisoners guilty, under the first count of the indictment, of having feloniously stolen the said barley and bags, the court sentenced the said two prisoners to twelve calendar months' imprisonment, with hard labor; but, after the verdict had been recorded, and the sentence had been passed by the court, the counsel, on the part of the prisoners, applied to the court to grant a case for the consideration of the judges of the Court of Criminal Appeal, on the ground that, in point of law, the jury were wrong in finding the prisoners guilty of stealing the four sacks of barley, inasmuch as there was no evidence to show that the prisoners ever had the said four sacks of barley in their possession, or that they had ever actually or constructively taken the same from the prosecutor with a felonious intent. Whereupon the Court granted a case for the consideration of the said Court of Criminal Appeal, and respited and arrested the judgment passed upon the said two prisoners, who are now in prison. And the question, which I now most respectfully submit to the consideration of her Majesty's justices of either benches, and barons of the exchequer, in pursuance of the statute in such case made and provided, is, whether the above facts do warrant, in point of law, the finding of the jury in this case.

H. F. YEATMAN,

Chairman of the Dorset General Sessions.

This case was considered on 3d June, 1854, by Lord Campbell, C. J., Alderson, B., Coleridge, J., Martin, B., and Crowder, J.

* *Ffooks*, for the prisoner. It is submitted that there is no evidence of an asportation. The sacks were not identified. Both prisoners were found guilty of stealing, and there is no evidence of their acting in concert.

LORD CAMPBELL, C. J. There is overwhelming evidence against both the prisoners.

The other learned judges concurred.

Conviction affirmed.

CASES

ARGUED AND DETERMINED

IN THE

HIGH COURT OF ADMIRALTY;

DURING THE YEAR 1853.

THE ELIZA CORNISH, otherwise THE SEGREDO.

June 18, 1853.

Sale by Master in a Foreign Port — Master's Authority — Necessity.

A British ship was sent home under the command of a master in the navy, who was placed in charge by the naval officer commanding on the station. On her voyage she met with bad weather, and put into a port at Fayal, where she was, after survey, sold at public auction to a Portuguese merchant, by the master: —

Held, that, no necessity being shown, and the proof of the validity of the sale by the law of the country not being made out, the sale was invalid by the General Maritime Law, and by the Law of England. Possession decreed to the British owner, with costs.

THIS case, the facts of which were remarkable, was argued by

Haggard and *Twiss*, for the British owner.

Addams and *Spinks*, for the Portuguese purchaser.

Dr. LUSHINGTON. As I understand that the ship which is the subject of the present litigation is still detained, and bail has not been given, I have been very anxious to dispose of this case at as early a period as possible; at least, at as early a period as would enable me to pay due consideration to several points, of no small difficulty, that have been raised in the discussion in this case. I could have wished, indeed, to have more time and leisure, and to have placed in a much more lucid order the observations which I think it necessary to make;

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but still, it appeared to me better to omit any attempt of that kind rather than incur further delay. The action brought is technically called a cause of possession; but, in fact, the question for the court to try and decide is a question of title, to determine which of the parties litigant is entitled, not only to the possession of the ship, but to a full right of property in her. This question the court has now ample authority and jurisdiction to decide, by virtue of the statute 3 & 4 Vict. c. 65. The limit of the jurisdiction of the court of admiralty in causes of possession, antecedently to the passing of that statute, it would, in my judgment, be wholly impossible to define; suffice it to say, that I think this suit is properly brought as a cause of possession, and that in such case the statute renders it my duty to decide upon the title to the ship. Perhaps it will be necessary, in the course of this judgment, to enter with particularity into the consideration of some of the facts set forth in these proceedings; but at present, in order to ascertain the questions to be determined in the cause, I think it would be most expedient to give only an outline of the case. This vessel was originally a British vessel, and the property of a British merchant, who has instituted the present proceedings. She was sent to the Pacific, and there occupied in voyages that I need not specify. Finally, on or about the 7th November, 1851, she was dispatched from Valparaiso to Liverpool with a very valuable freight of specie, silver, and some other merchandise. In the course of that voyage she was under the necessity of coming to anchor at Sandy Point, in the Straits of Magellan, a convict settlement belonging to the Chilian government. There she was seized and taken possession of by an overpowering force; from that force she was rescued by her Majesty's ship *Virago*, commanded by Captain Houston Stewart. I should observe, that it appears to me wholly immaterial, for the purposes of this suit, whether the ship was rescued from insurgents or pirates.¹

Before this rescue had occurred, the master and supercargo were murdered. Captain Stewart, under the orders of Admiral Moresby, who commanded upon that station, placed the vessel, which had been brought back to Valparaiso, under the command of Mr. Bowden, a master in the navy, with directions to take her to the port of Liverpool, whither she was originally destined. Mr. Bowden, with two or three petty officers and some seamen in her Majesty's service, together with the remaining part of the crew of the vessel, took charge of her, the mate and several of the crew still remaining on board her, and the ship proceeded on her voyage, as I understand the facts, with the same treasure with which she had been laden when she left Valparaiso originally, it having been rescued from *The Florida*, an American vessel, also seized at Sandy Point under similar circumstances. In the prosecution of that voyage, in consequence of contrary winds and tempestuous weather, the vessel was compelled to

¹ This question, which was important as to bounty money and salvage, under the 13 & 14 Vict. c. 26, has since been decided. See the case of *The Magellan Pirates*, 25 Eng. Rep. 595.

take shelter at Monte Video, where she arrived on the 23d April, 1852, and was detained till the 25th June following; and the repairs there done amounted, together with the expenses, to 875*l*.

On the 25th June she left Monte Video for Liverpool, but having met again with bad weather and other accidents, she was compelled to make for the island of Fayal, and on or about the 19th August came into the port of Horta. Mr. Bowden then adopted the following measures: he had surveys made of the ship, and in his judgment it appeared inexpedient to repair her, and accordingly, with the consent of the superintendent of the customs in that island, she was sold by public auction; the cargo was transhipped into another vessel, and after many disasters and another transhipment, finally reached England. This vessel, The Eliza Cornish, was repaired at considerable expense by the purchaser at Fayal, and he sent her on a voyage to the port of Bristol, where she was arrested at the suit of her original owner, Mr. Dean; and I have now to determine whether Mr. Dean is entitled to have possession of her given by the court, whether he is entitled to the property in her, or whether the sale at Horta was legal, and the Portuguese purchaser is entitled to hold her.

Now, I may here mention, that there does not appear to have been produced, and for what reason I am unable to say, any bill of sale whatsoever. Of course, this is the document that the court naturally looks for in the first instance, it being the ordinary title by which any and every ship is held which is sold; but I neither find any bill of sale, properly so called, nor do I find any thing equivalent to it, or in lieu of it. I am therefore left to conjecture what was the nature of the title purported to be given by those who sold her.

Now, the above is a very imperfect outline, as I well know, of the history of this transaction; but, as I mentioned at the outset, I abstain from going into greater detail at present, because I must necessarily do so, when certain particular questions arise, hereafter. I think, however, what I have said is sufficient to lay the foundation for the following leading questions. The first question which presents itself to my mind is, by what law is the court to be governed in resolving the points submitted to its decision? First, am I to take that which is sometimes called the general maritime law of all nations engaged in marine enterprises? Secondly, am I to adopt the law of England, which may be different? Or, thirdly, am I to be governed by the law prevailing at Fayal? Now, these are questions which require great consideration, and respecting which, the court would be reluctant to lay down any rule or principle beyond that which is indispensably requisite to the decision of the present point. It would be rash, indeed, if, in matters of this kind, I were to endeavor to reconcile all the conflicting cases, and to extract out of them any general rule, when I find so many minds, of great ability, talent, and research, have certainly abstained from any thing like an attempt of that nature. The court must ever bear in mind that this is a transaction taking place in a foreign country, and in which the interests of a foreign subject, resident in that country, are concerned; but the court must also recollect that, in the same transaction, are involved the interests

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of a British owner, and that the acts done, were done by a British subject, authorized in some way or other, to govern and to dispose of the ship, and that he was there, not as a permanent resident — I am speaking now of Mr. Bowden — but, as an individual, by an accident of the wind and weather, compelled to put in for a temporary purpose. There is a wide distinction in contracts which are entered into in a foreign country by a British subject, resident there for a permanent purpose, and contracts entered into by a British subject accidentally entering it.

First, it strikes me that the law which I must seek to administer, if I am able to discover it, is the law maritime — a law which has been often adverted to by Lord Stowell, and by others whose lights I seek to guide me, but which has been defined by none ; perhaps it is not possible to define it with great accuracy, because the law of almost every foreign country, in some part, differs from that of other foreign countries ; still, it is an expression in common use, and I apprehend it is intended to convey the meaning, that it is the law which generally is practised by maritime nations. I think, therefore, this is the law which I must seek to discover, and I must not deviate therefrom by introducing the English municipal law, unless I should happen to be compelled to do so by virtue of statutes, which, of course, it is my duty to obey ; because, if it seems fit to the legislature of this country, to pass any act which is intended by it to bind foreigners, I, sitting here as a judge in the Instance Court of Admiralty, am clearly bound to obey that statute, even though that statute law might not be consistent with the law maritime, in any country where the transaction took place. I think, also, that I am equally prohibited from giving effect to the law of the island of Fayal, unless it accords with the general maritime law, or, in other words, unless, upon consideration of the peculiar circumstances of the case, I should be of opinion that the *lex loci contractus* is a part of the general maritime law, or ought to be imported, for special reasons, into this cause. Without saying what the immediate effect would be, I must again repeat what I said before, that I ought to exercise great caution in dealing with the interests of foreign persons, and not with the interests of British subjects, only. In the many cases to which I have resorted for information, I regret to say this distinction does not seem to have been always perceived, nor always kept in mind ; I mean that, in the judgments pronounced, the learned judges have been considering the cases before them, and have not recollected, or at least not stated, with any clearness or precision, any difference which they might think existed between the administration of the law as related to foreigners, and the administration of the law as related to British subjects. That would appear especially so with respect to questions of bottomry and hypothecation.

In the very commencement of Lord Tenterden's work on Shipping, to which I was referred in the course of the argument, the general law as to the sale of ships, is fully discussed ; and I say the general law for this reason, because, without occupying time by reading that first chapter of Lord Tenterden's work, it is perfectly mani-

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fest from the whole of that chapter, that Lord Tenterden had in view the general maritime law, as well as the municipal law of this country. He refers to writers on the general maritime law, such as American and others, as well as he does to the authorities of our own courts of law. I take it to be a principle quite incapable of being disputed, that ships in general, cannot be sold, save by an instrument in writing; and it is equally clear, that such instrument in writing, must proceed either from the owners or some persons authorized to act, and acting as their agents, or else by the decree of a competent court. The master in general, as is admitted on all hands, has no authority to sell the ship; but, whatever opinions may have been doubtfully expressed on the subject — and, certainly, there have been many opinions, going the length that the master, under no circumstances whatsoever, can sell — it appears to me clear, upon reason and authority, looking at what the law now is, that, in case of necessity, he must be invested with that authority and power, with regard to the sale of British ships to British subjects.

Lord Gifford, in the case of *Robertson v. Clarke*, 1 Bing. 445, which is cited at large in Abbott on Shipping, laid down the law in as clear terms as I think it has been expressed by any other judge, whatever, or any other authority. He expresses himself in these words: "I agree that it is not sufficient to show that the sale was *bonâ fide*, and for the benefit of all concerned, unless it be also shown that there was an urgent necessity for its being resorted to." Lord Tenterden states that the doctrine, that necessity alone can justify the sale of a ship by its master, and sustain the title of a purchaser from him, is in strict conformity with the laws of other maritime nations; and that is a most important passage, because it shows that, in this respect, to which I am now adverting, the law laid down by the highest authority in this kingdom, is precisely the same law as is laid down, generally speaking, by all other maritime states; therefore, the law of England and the great maritime law, are in conformity with each other. Lord Tenterden cites several authorities for this position, and many similar authorities might easily be added, and especially there might be added many authorities from American writers and American reports.

In the course of the argument, counsel adverted to some which appear to have a clear bearing on the question, especially the case of *The Schooner Tilton*, 5 Mason's Amer. Rep. 465, in which Mr. Justice Story delivered a very able and elaborate judgment. But it is unnecessary for me to do more than mention them. And there is not only the authority of Lord Gifford in the King's Bench, but the position is laid down by Lord Tenterden himself. That decision of *Robertson v. Clarke*, was in 1824, and Lord Tenterden published another edition subsequently to that; therefore, there is his own confirmation. It would only be a waste of time to cite further authorities. The doctrine is confirmed by *Idle v. The Royal Exchange Assurance Company*, 8 Taunt. 755; 3 Br. & B. 151, and confirmed by the last decision of all — *Hunter v. Parker*, 7 M. & W. 322; therefore it may be taken to be, beyond all doubt and question, the law of this country as well as the law maritime.

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There are other reasons why I do not enter into this point more particularly, and among these, first, there is no authority to be cited against that doctrine; secondly, that it would be, in my judgment, most dangerous—it would be most detrimental to the interests of ship-owners all over the world, to confer on a master, by law, a discretionary power of parting with the property of his owners. I might enlarge very much on this subject, because I might enter into a consideration of how the matter would affect not merely the interests of the owners, but the confusion it would create as to the interests of the insurer and the insured. That is a matter of importance to be considered, and, as it appears to me, nothing is more desirable to avoid than that those great interests, by which the mercantile navy are protected to the extent they are by insurance, should be thrown into confusion or weakened by the introduction of any different principle. This being so, to render valid the sale by a master there must exist a necessity for that sale; the sale, though *bona fide* and beneficial to the owners, will not avail without necessity. What circumstances constitute necessity cannot with accuracy be defined. I might say that writers have strained hard to arrive at something like a definition of what necessity is; but it is quite obvious that necessity must depend on a combination of circumstances, which it is impossible to foresee, and impossible duly to estimate. In my judgment it would be more easy to state, not what constitutes necessity, but under what circumstances necessity cannot exist. If, for instance, the ship is capable of repair, and the master can raise money either on the bottomry of the ship or cargo, then I conceive that no legal necessity can exist for a sale; that I think will be quite clear.

Then, having thus far endeavored to clear the way, I must now address myself to the determination of three questions of a rather different character, namely, first, the authority of Mr. Bowden to sell; secondly, the existence of necessity which is alleged in this case; and, thirdly, a point to which I have already adverted, whether, under the circumstances, I should be justified in this case in administering any law differing from the general maritime law, or, to use another mode of expression, ingrafting a peculiar exception upon it. To proceed, then, to consider what authority there was in this case for the sale, I must look to the position in which Mr. Bowden was placed. For this purpose, I deem it unimportant whether The Eliza Cornish was rescued from insurgents or pirates, for whatever may have been the proper description of those who forcibly took possession of the vessel, I do not conceive that any distinction can be drawn, important to the result of this case, out of that forcible and illegal possession. She was rightly rescued by her Majesty's ship Virago; and by the act of Captain Stewart, and the authority of Admiral Moresby, I think the command of her was duly conferred on Mr. Bowden. I am of opinion, looking at all the circumstances of this case, and considering the description of cargo that was on board of her, that Captain Stewart may have been fully justified in intrusting the command to Mr. Bowden, a master in the navy, and in not allowing the mate to take the place of the deceased master. It is true that in ordinary cases, upon

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the death of a master, the first mate may succeed to the master, though we all know that very frequently, nay, I may say constantly, this course is interrupted by the interference of agents, consuls, or other persons, who claim to have interest in the cargo; and the circumstances of this case seem to me to have made it fit that Captain Stewart should exercise his own discretion in this respect. I am of opinion, therefore, that Mr. Bowden was duly invested with all legal authority as master — that he possessed the same power over the ship that the former master himself, if alive, would have had; but I cannot conceive upon what principles it could be contended that he possessed any other or greater power.

It is, indeed, alleged on behalf of the Portuguese owner, that by virtue of his appointment, Mr. Bowden had full authority, as master of the ship, to act in all things — I believe I am citing the very words — to the best of his judgment, for the benefit of the owner and all parties concerned. Now, that is the position laid down by the Portuguese owner — by virtue of his appointment; and if it be meant by this statement that Mr. Bowden had the same authority as an ordinary master, I concur; if it be contended that he had greater power and authority, then I cannot give my assent to the proposition, for I know of no rule, I know of no principle by which it can be maintained, that either Admiral Moresby or Captain Stewart had or could acquire any right over this ship which would enable them to delegate to their own appointee any greater power than belongs to an ordinary master, and certainly not what is contended for in the act on petition — an arbitrary power to dispose of the ship itself. Whether it be a case of salvage or not, I am not to inquire; because assuming it to be such, no right of sale was consequent on the right of claim for salvage. I conclude, therefore, this branch of the inquiry by stating my opinion that Mr. Bowden, as relates to the sale of this ship, was an ordinary master, possessing the ordinary power and authority of master, and no more.

I will now refer to the steps adopted in the island of Fayal, which appear to be as follows: Mr. Bowden, on his arrival at the port of Horta, obtained the assistance of Mr. Minchen, her Majesty's vice-consul at that place, and he applied to a person, who is denominated either the director or superintendent of the custom-house, to have a proper survey of the vessel; and very fitting measures they were to be taken. Three several surveys were accordingly made, on the 21st and 24th August, and the 4th September, and they were made by persons connected with the custom-house, and to these surveys I must now direct my attention. They are found annexed to the affidavit of Mr. Bowden, and in the document marked C. Now, the first survey, bearing date the 21st August, does not represent the vessel to be unseaworthy, but it merely states the loss which he had sustained with regard to the topmast, and other matters that I need not recapitulate, and that she required to be caulked, not making any water in the harbor. That, I think, is the substance of that survey. Then the director of the custom-house appears to have given an order that this survey should be carried into effect, by doing what was mentioned

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in the survey itself. However, this was not deemed satisfactory, and the next survey which we have on the petition of Mr. Bowden takes place on the 24th August, and the surveyors there reported that they had newly examined the hull, and that they found some worm holes, which had been covered by the copper, and they directed that the vessel should be discharged. This survey, as well as the first, took place in the presence of Mr. Lane, who was agent for Lloyd's. Next, the cargo having been taken out, and the vessel discharged, the third survey was made on the 4th September. Then, of course, there was ample opportunity for those who made the survey to ascertain the precise state and condition of the vessel, whether capable of repair or not, and what was the extent of the repairs to be done, and what would be the probable amount of cost. They report, amongst other things, that the hull was in good repair, and she would be navigable when certain repairs therein stated were done; and the repairs there stated are estimated at about 300*l*. I believe I have stated accurately the summary of the contents of that survey.

But the matter does not rest here. Mr. Bowden was dissatisfied, and the course which he adopted I must now advert to. The proceeding taken by Mr. Bowden was not founded upon any further survey under the authority of the customs, but he presents a petition on or about the 10th September, stating, for the reasons therein set forth, that he considered it for the interest of all concerned to sell the vessel, and he petitions the director of the customs to give the necessary directions for the sale of her as customary. The petition is granted. The vessel is sold on the 14th or 15th September, for the price of 185*l*. 4*s*. 10*d*. In considering this proceeding by the director of the customs, the first observation that necessarily strikes one is, that the sale neither was nor could be justified by the official surveys already had, because the purport of these official surveys, so far from recommending the sale, is, that the vessel was reparable, and that at the expense of 300*l*. only.

I must observe, I cannot but entertain some little hesitation as to the extent of consideration to be given to the proceedings of the superintendent of the customs, who orders the surveys to be made, orders the first three to be carried into execution in the way he has done, and then, all of a sudden, without a fresh survey, upon the mere representation of persons acting for the master, gives up at once all he had previously determined, and orders the vessel to be sold. It makes one distrust, like other courts, the proceedings by the commissioners of wrecks; it makes one distrust proceedings by superintendents of custom-houses; it makes one distrust all acting under the advice of persons of that description. Throughout all that proceeding, it is quite manifest that Mr. Bowden was in reality not governed by any thing that was done at the custom-house — not at all; it was a mere shadow; it had no substance, no reality, because he had recourse to other advice. He had an examination made of the vessel, in the first instance, on or about the 21st August, by persons on board her, who, at that very early period signed the letter marked A, addressed by Mr. Bowden to Mr.

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Minchin, the British consul. That letter, marked A, is to the following effect: "Sir: I have the honor to acquaint you, that on further examination of the hull of this vessel, and after trying the planking in several places, there was found a considerable portion of her timbers rotten and worm-eaten, particularly about the bends and counter; so much so, that after taking into consideration the expense and loss of time that would be incurred in refitting the vessel, together with the probability that the bottom would, on examination, prove worse than the upper portion of the hull; taking also into consideration the lateness of the season by the time the defects could be completed, I am of opinion, with all my officers, and likewise Captain Langlois, passenger, that The Eliza Cornish is totally unfit and unsafe to proceed to England under such circumstances." So that, in fact, before the surveys were made, this gentleman had entirely made up his mind that the vessel was unfit to proceed to England at all.

Then, again, about the 6th September, Mr. Bowden consults the masters of other vessels, together with the carpenter of a vessel called The Peri, and these persons wrote the letters marked B and C. The one is dated the 24th August, merely as to the vessel being discharged; the other, which is marked C, is to the following effect: "Agreeably to your request, we have been on board The Eliza Cornish, and have examined her. We report as follows: The outside plank very much worm-eaten; in fact, a perfect honeycomb. We stripped the copper, and found the plank as much worm-eaten as above it. Rudder-head sprung, and otherwise bad, requiring a new one. Inside survey: The apron very rotten. The breast-hook requires fastening, and we think there is very little substance to fasten it to. We found the ceiling wet through, and by cutting it, found it rotten, and timbers very much so; and after considering the lateness of the season, together with the cost of spars, sails, cordage, and other things required, we are forced to say that she should be condemned as unseaworthy, and ever will be so." It is, then, upon this extra-official survey that Mr. Bowden thinks fit to act, and not upon the survey taken by persons appointed by the officers at the head of the customs.

There is another document, marked D, signed by Mr. Spooner, the master of The Sea Fox, in which he states his opinion. It is in the following words: "I have sent in the report of the survey which you have received, which was impartial, in which we expressed our opinion freely. In this I shall give my advice, if you think it worth the while to take it. The brigantine Eliza Cornish, the vessel in your charge, is neither seaworthy, nor will she ever be. She could not be repaired in this port at any rate, as, by inspecting the outside plank, she must want a new bottom altogether. In addition to the report, I should say to you, that if they did not condemn the vessel on that report, I should advise you to abandon her at once, after taking out the cargo that remains."

I cannot help saying, that though it might be an instance of very laudable anxiety on the part of Mr. Bowden to get the best informa-

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tion he could as to the state and condition of his vessel, and as to the steps proper to be adopted; either for repairing her, or having her, what is called in this letter, condemned, yet I think it must be apparent to all, that it is impossible to mix up these private and public surveys together; and, least of all, could it be contended, that the course adopted by Mr. Bowden was justified by the surveys, or any thing done by the order of the director of the custom-house, except the order to sell, which was founded on the representation of Mr. Bowden himself. Now, I cannot help thinking that the result of the consideration of all this evidence is, that there was, on the part of Mr. Bowden, a determination to sell this vessel, founded solely on private reports which Mr. Bowden caused to be made, and not on the official reports. That Mr. Bowden acted according to the best of his judgment, for the benefit of all concerned, I do not doubt; but that this vessel was capable of being repaired at Horta, though perhaps at a very considerable expense, is most abundantly clear, for she was repaired by the new purchaser, and she did reach this country as early as the 28th November, in the same year. The order for sale was dated the 10th September; within little more than two months the vessel was repaired, and she brings a cargo to the port of Bristol.

I know it is sometimes contended, that it is hardly fair to judge by the effect of subsequent transactions; and I agree in some measure with that argument; and if there had been any real doubt existing as to the capability of the repair of the vessel, I would not have rested on the mere fact that subsequently she was repaired, and came to this country. But there is, it appears to me, the fact of the capability of being repaired proved by her coming to this country, which is in unison with all the official reports that took place at Fayal. It is in opposition to the private reports and the surveys taken by Mr. Bowden, but it is in conformity with all that was intended to be done under the authorities in the island of Fayal.

Now, I must observe upon another thing. The court has no affidavit, either from Mr. Minchin, the vice-consul, or from Mr. Lane, Lloyd's agent. This, I must say, is an absence of proof which there is great reason to complain of in this case. I must consider what these gentlemen did, and the course of conduct they pursued. It is a part of the important *res gestæ* in this case, what those who had authority in the island of Fayal did or did not do; therefore, though the means of forming an opinion on the evidence from which I am to judge, are exceedingly defective, yet I cannot avoid pursuing the investigation. In a place like the island of Fayal, where there are many British mariners, the person who represents her Majesty as consul or vice-consul, is, of course, an important personage, to whom masters of ships might very properly revert, in all cases of difficulty.

Again: under similar circumstances, we all know there is no person whose advice is more to be relied upon, in ordinary cases, than that of Lloyd's agent, because fortunately it so happens there is hardly any port touched at in the world in which there is not an interest.

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secured in this country. I think, however, that I have enough to form the following opinion, namely, that these proceedings did meet with the approbation of Mr. Minchin, but there is no proof whatever that Lloyd's agent concurred in that opinion. It is stated that Lloyd's agent is far from approving, it is pleaded that, so far from approving of these proceedings, he offered to advance the requisite funds. A letter has been annexed, which, supposing it is evidence, establishes that fact. I am inclined to come to the following conclusion with regard to that letter; it is admissible for certain purposes, but I am not satisfied that I can use that letter as legal evidence to prove that fact. I am not able to discover, with respect to that very difficult subject, what is or what is not evidence in correspondence of this description which takes place abroad, or that any very definite principle can be laid down on the subject; but it appears to me to be the safer course, on the present occasion, not to consider that letter as any evidence of the fact that Mr. Lane offered to advance the money. Suffice it to assume, that the sale was made with the consent of Mr. Minchin, but not with the concurrence of Mr. Lane; the rest must remain in the obscurity in which the parties have left it.

I must now briefly advert to what was done. The vessel was refitted at an expense amounting, as stated at Fayal, to the sum of 929*l.*, but that included all the expenses incident to equipments; and I am by no means satisfied, on the evidence before me, that the repairs necessary to be done to enable the ship to complete her voyage would have amounted to such a sum. I rely not entirely upon the estimate made by the survey, which was the sum of 300*l.*; but suppose I add to it 150*l.* or 200*l.*; it is scarcely possible to suppose, if this estimate was made by a person of any competency to perform that duty, that he could be so mistaken as to estimate that at 300*l.* which would require 900*l.* It is also stated that a further expense was incurred at Bristol, amounting to 140*l.* This appears to me of no importance whatever in the solution of this case.

Under these circumstances, assuming that the sale was *bonâ fide*; assuming that it was advantageous to all concerned, which is a great proposition to assume, and I cannot by possibility say it is really true, for I cannot say how the interests of the underwriters would be affected, and they are persons concerned; I cannot say what right the owners have to go against the underwriters, or what right they have to resist; but assuming, for the purpose of argument, that it was advantageous to all concerned, the question is, whether it was necessary. The capability of repair being established, were there the means of paying for that repair? Of that there can be no doubt, for, to say nothing of hypothecation, the cargo consisted of specie in considerable part, and presented a fund ready at hand for the discharge of all repairs; a fund which was actually employed for much less important purposes, namely, the payment of expenses incurred at Fayal. Again; I say, without attempting to define what constitutes necessity, I cannot bring myself to entertain a shadow of doubt, that where a ship is capable of repair, and where means exist, by

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hypothecation or otherwise, of paying for those repairs, no necessity, in the legal sense of the term, can be said to exist. If, then, necessity is an indispensable ingredient, in a case of this description, to warrant a sale, here it is not to be found; and consequently I am of opinion, that by the general maritime law, and the law of England, no legal transfer of the property in the ship took place by this sale.

I have not quite finished my task, but I am approaching to the conclusion of it. It remains to be considered whether I am justified in ingrafting any exception upon this law from a consideration of all the other facts appearing in this case. It is contended, and very properly so, that this sale was legal according to the law prevailing in the island of Fayal, and that law is certified by two gentlemen said to be cognizant of it. Now, the law said to prevail in this island is, that the commissioners of the customs may sell the ship, with the consent of the master, when it is not worth the expense of repairing and outfitting; and then I must add these important words, "but there must first be surveys thereof." What is meant and intended by this affidavit? This affidavit is in these words. I had better read it, for it is very material. After stating how well acquainted they are with the law, and the mercantile usage of the country, they state, that "when a ship of any nation whatever arrives damaged in the ports of this island, and it appears to the master or any other person having charge of the command thereof, that she may not be in a navigable state, it is customary, and according to the laws of Portugal, for the master or any other person having charge of the command thereof, with the aid of his respective consul, vice-consul, or consular agent, to request the commissioners of the customs of this island to direct one or more surveys of such ship to be proceeded to, and after those surveys have taken place, it is likewise customary and lawful, and the laws of this country authorize the same, to sell the said ship when it is not worth the expense of repairing and outfit."

This opinion certainly appears to me to be framed to meet the precise circumstances of this case, because it does not state the law in any ordinary form; it states exactly what took place, to a certain extent, in this very individual case, namely, the master and other persons having charge of her may request the commissioners of the customs to direct one or more surveys, and then order her to be sold, which is exactly what took place on this occasion. In one particular I do not know that this is very satisfactory, because for what purpose are these surveys had? These surveys, I apprehend, are for the purpose of guiding the discretion of the commissioners. It is perfectly useless to have a survey unless that survey is to have some operation and effect on the mind of the person who is to act upon it and who directs it. Nor can it be said for a single moment, that these surveys are to be mere matters of form, and the commissioner is to decree a sale according to his mere will and pleasure. Then must not the true meaning be, that if, after these surveys have been taken, it is made plain to the judgment of the commissioner that the said

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ship is not worth the expense of repairing and outfit, he is then to sell? Can any one say that this was the case after the surveys, when the surveys say that the vessel may be repaired, and that at the expense of 300*l.*? I have thought it right to make these observations on this certificate, which comes in these terms without authority of any kind or description, except the opinion of these gentlemen. However, for the sake of completing the principle of law, I will take the fact to be, that the survey was properly made, and that the order for the sale was derived from these surveys ordered by the director of the custom-house; and I will take it to be true that the ship was not worth the expense of repairing and outfit, and I will take the law to be as stated to be by these gentlemen; and then I come to the question at once. Am I at liberty to adopt this law as an exception to the general maritime law — a law which would sanction and render valid the sale of any British ship in a foreign port — merely upon a conjecture and estimate whether the ship was worth the expense of repairing and outfit, and that too without calling in the aid of a court of justice, but merely through the executive power of an officer in the customs? That such a law would be for the general convenience and advantage of all maritime nations I am by no means inclined to admit; on the contrary, I am well satisfied that in principle and in practice — in practice, too, looking at this very case — it would be most injurious to the interests of all those concerned in commercial shipping if I were to adopt any such principle; and I feel equally assured that it would be equally inconsistent with the present maritime law of the civilized world.

But, then, am I to adopt such a rule on the principle of the *lex loci contractus*? In what way does the *lex loci contractus*, in the case of the sale of a ship, entitle itself to be so admitted? If such general proposition could be entertained, the law relative to the sale of ships would be a law varying with the law of each individual country wherever the sale happened to take place; in fact, there would be no general maritime law at all, but a law to be inquired into in every case where the transfer took place in a foreign country. I should have one law to look for at Fayal, another in our own colonies, another in Demerara, another in Trinidad, another in the French colonies, another in England. Now, I know of no right which the purchaser of a ship in a foreign country, such ship not belonging to a subject of that country, has to call for the interposition of the *lex loci contractus*, save indeed in one case only, where the title is derived from the decree of a competent court administering the law in its own jurisdiction, and, by its decree, conferring a title. For had the ship been purchased under the decree of a court of admiralty directing her to be sold, in a case within its jurisdiction, or the law of a court resembling our own Court of Exchequer, I should have hesitated long before I disputed that title.

Now, a word on that subject. It has been decided, as we all know, in our courts, with regard to a British ship, if it should be condemned by a court of vice-admiralty, that gives no title to the purchaser whatever. It is decided and fixed law in the courts of America, that

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a sale made in a case of a commission of wreck confers no title. A case, *The Schooner Tilton*, 5 Mason's Amer. Rep. 465, was cited at the bar, in which a judgment to that effect was delivered by Mr. Justice Story, and a most admirable judgment it is, it exhausts the whole subject. But when we speak of the decree of a court of admiralty, it is quite manifest, from a consideration of all the cases, that the reason why a decree of the Court of Admiralty had not the effect of giving a title was from want of jurisdiction in the Admiralty Court to entertain the trial at all. Lord Ellenborough says, in his judgment in *Reid v. Darby*, 10 East, 143, that he has made great inquiry; he says he finds, though the practice has obtained in vice-admiralty courts abroad of entertaining applications to examine whether a ship ought, or ought not to be sold, on account of damage, for the benefit of all concerned — though that practice has prevailed, he states expressly that the result of his inquiry is, that vice-admiralty courts have no such jurisdiction. I think the judgments at common law, proceeding on that principle, are to be maintained on that ground, and no other; because I wish to guard myself against this, supposing there was a court of admiralty existing in a foreign country, which by the law of that foreign country had a jurisdiction to entertain questions of this nature, I wish it to be distinctly understood, that I do not, under circumstances of that kind, say I would not respect the title conferred by such a court of admiralty. I do not say I would; it is a point hereafter to be considered and weighed; but I wish to guard myself against supposing that it does not give a title. I remember that many years ago, in *The Attorney-General v. Norstedt*, 3 Price, 97, the great question at issue was, whether or not the decree of a court of admiralty, proceeding *in rem*, was not binding on all the world, and so that forfeiture to the crown could not bar it. It was decided in the affirmative, and I think properly so. Therefore I wish it to be understood, that, in the event of a title being given by an admiralty court having jurisdiction, or a court of common law, I do not preclude myself from considering that to be a valid title.

Again: I should consider this — supposing a vessel was sold by decree of the commissioners of the Court of Exchequer, for forfeiture, that I should hold a good title, if such a case could occur. Supposing a vessel sold in a foreign country under the law prevailing in cases of insolvency or bankruptcy, I should hold that also to be a good sale. But I wish it to be understood that I go on the ground, that nothing short of that appears capable of justifying and making a good title.

Now, having made these observations, there are very many other considerations, which ought to be shortly adverted to, why I do not adopt that law. It is a general principle, to which I give my unfeigned consent and approbation, that the *lex loci contractus* generally governs the validity of every contract. Its mode of execution may depend on the place where it is to be carried into effect; but with respect to the validity of a contract itself, it is a principle adopted by all writers on the law of nations, almost without exception as a general principle, that the *lex loci contractus* ought to govern individ-

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ual transactions. But the question is, whether the *lex loci contractus* is always applicable, or whether there are not certain exceptions to that rule, and whether the case does not form one of those exceptions; and without entering into it minutely, for it would occupy time, I will refer to a note to be found to the 286th section of the last edition of Mr. Justice Story on the Conflict of Laws. Now, that note refers to several authorities, but there is a remarkable reference to a note which was written by Mr. Brodie, the very learned editor of Lord Stair's Institutes, in which this very point is discussed at considerable length, and he takes several distinctions, not having, perhaps, any particular case in view. All these distinctions do not apply to a case so very peculiar as that now under discussion, but there appear to me, according to his judgment, several reasons why the *lex loci contractus* is not always applicable. He says this: "A distinction is ever to be attended to between the case of a party casually entering a foreign country, and that of one who resides in it; and the distinction is particularly strong in regard to an individual, who, as master, has the charge of a vessel in a foreign port." And he states he is, under these circumstances, likely to be ignorant of the law of the country, and not to be too tenaciously bound. Then there is another distinction, and that by far the most important. "The contract," says Mr. Brodie, "in such cases is made with the shipmaster, who acts as the implied mandatory of the owner; and the effect of the transaction must greatly depend on the extent of his authority. Now, it is true, that as a person who has been appointed to an office must be presumed to be invested with the usual powers, so restrictions upon the ordinary authority will not be effectual against another party who has not been apprized of them. Yet it will be observed, that since it is the duty of those who deal with an agent, to make themselves acquainted with the extent of his powers, whether expressed, or fairly implied from his office, so the presumed mandate here must be measured either by some general principle of maritime law, or by the law of the country to which the ship belongs. Such a general principle of maritime law would of itself, though in a different way, tend, in my apprehension, to exclude the *lex loci*; but there is no such universally received principle, and the more positive exclusion of the principle of the *lex loci* is the consequence."

And then he goes on to state what the English law of hypothecation is, and how we should apply it. I believe, that if this case had come under the consideration of courts of common law, instead of the Court of Admiralty, a great deal of the matter to which I have addressed myself would not have formed part of their consideration. My conviction is, that they would have looked to that very argument used by Mr. Brodie, namely, what authority had the master to sell? They would have taken the extent of his power, according to the definition of Lord Tenterden, and beyond that they would not have said a contract as to a ship is contrary to other contracts. Ships go all over the world; with regard to them, the law of our own country must be primarily looked for. That is my conviction of the mode the question would have been dealt with. I am confirmed in this by

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seeing that, in the ordinary cases on this subject, the fact of the sale taking place in a foreign country to a foreign purchaser, never appears to have had any effect on our judges; for, in the earliest case, *Tremenheere v. Tresilian*, 1 Sid. 452, before Sir Matthew Hale, cited in Lord Tenterden's book, he decided that the sale of a ship by the master did not convey the property to the buyer, although the sale was made in a foreign country, in a case of inevitable danger. The incident of being in a foreign country, forms a part of that judgment; and in looking, as I have with some degree of care, to the various judgments which have taken place in different courts on the subject of title to ships, I do not see that the fact of sale being in a foreign country has ever induced our judges to form any different opinion from that which they would have formed if it had taken place in a British colony.

It was formerly the law—the law within the last forty years—that if a sale took place in a foreign country, from a case of necessity, yet, if the registration acts had not been complied with, that sale was void. That law was laid down by Lord Ellenborough, in the Court of King's Bench, and on the highest authority, has been relaxed. I should have held that I was doing an act of injustice, if I had bound a foreign owner by all the technicalities of the registration acts. I should have good right to bind him by the general municipal law, so far as it was conformable to the general maritime law, but I should have no right, in a case of absolute necessity, to bind him by the registration acts. I think, though it ought to be presumed that the purchaser should look at and inquire as to the authority the master possesses, the general authority, yet, it never can be expected, with any show of justice or equity, that foreigners should, in a distant part of the world, be supposed to know there were certain technicalities in the registration acts, which would annul a sale otherwise valid; let it be understood, I speak of a case where it would be otherwise valid.

Now, there is another matter I will shortly advert to before I terminate this discussion, and that is with regard to cases of hypothecation. I conceive, that in cases of hypothecation, the fair result to be drawn is, that all our courts, which have had to consider that subject, have never deemed themselves bound by the law of the country where the bond was given. It is singular, seeing the great number of cases which have occurred, and the points that have arisen, that this should not have been matter of discussion, because the great number of bonds that come under our consideration, are bonds not given in British colonies, but in the ports of foreign countries; yet in no instance has it been prominently brought forward, except incidentally, in this way.

It has been said: "Why, by the law of nearly the whole of Europe, sometimes even the proposition has been pressed so far as to say, by the law of all civilized states, except England, you have a right to a lien against the ship for any thing done on her behalf in the way of repairs and furnishing necessaries; and you might do more than that—you might, though the ship was not in your possession, take

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her in possession, and sell her to liquidate these demands." This has been alleged, particularly in the case of *The Augusta*, 1 Dods. 283, as a ground for bottomry bonds. And it is rather difficult to say how that ought to operate; it never has been acknowledged to be a law that is binding in any degree upon the courts here; but I have always myself considered that, where there was an imminent degree of danger of a ship being so sold, unless the master was enabled to get money to prevent the sale, it certainly was a case which, to a certain extent, I might rely upon as justifying the taking of money on hypothecation; not that I acknowledge the law as binding upon me, but it constitutes a part of the necessity of the master. These are two distinct and separate propositions. In no case that I am aware of, I do not say the subject may not have been discussed and agitated, but I am not aware of a decision upon it. In a case appealed from this court not long ago, *The Bonaparte*, 17 Jur. 285; s. c. 20 Eng. Rep. 649, it formed no part of the discussion or decision. I may, however, further observe, that in this case no attempt appears to have been made to communicate with the owner of the ship at home, though such a step was not very practicable, on his own showing. Even in the case of bottomry, such communication ought, if possible, to be attempted; and where it is practicable, and not done, even a foreign merchant advancing his money, we know, is not entitled to recover. Here, too, there is no danger as relating to the cargo. The valuable part of the cargo was not of a nature to be deteriorated by keeping; and another consequence of such a sale as this is, that it entirely destroys and may disturb all the rights subsisting between the owners of a ship and the owners of a cargo. We know that has taken place in several instances. I say nothing of the insurers and the insured, because I have already adverted to them.

Another proposition was made—that there was danger of the chance of the ship being damaged in the place where she lay: that danger is set forth here, and may have existed to a certain extent, but all the facts in this case satisfy my mind that this was not a substantial reason for sale: I, therefore, discard that from any further consideration. Thus, looking at the whole of the case, I have come to the conclusion that I cannot adopt the *lex loci contractus*; and if I reject the *lex loci contractus*, it was not the sale of a ship from necessity, which alone could justify such a disposition of it. I am, therefore, bound to hold that this sale was invalid, and to decree possession to be delivered over to the original British owner.

Haggard applied for the costs.

Dr. LUSHINGTON. Yes; my only reason for giving costs is, that it is now laid down by all the courts that costs are to follow the result of the case. At this moment, it is a regulation by the privy council, that in every case where the appellants succeed, the respondents are to be condemned in the costs of the appeal. Therefore, I am bound to go on that principle.

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February 28, 1853.

Towage, ordinary, extraordinary — Agreement.

Ordinary towage is service rendered in expediting an undamaged ship on her voyage.

Extraordinary towage is a service rendered in bringing a disabled ship to a place of safety.

In ordinary towage an agreement may be affected by subsequent events.

In extraordinary towage the agreement is, as a general rule, binding.

The state of the ship must be fully disclosed, in order that the agreement may be valid *ab initio*.

THE facts of this case are fully stated in the judgment.

Addams and Twiss, for the salvors.

Jenner and Deane, for the owners.

DR. LUSHINGTON. I have no intention of departing from the principle I laid down in the case of *The Kilby*;¹ on the contrary, I am

¹ In *The Kilby*, an action was brought to obtain remuneration for alleged salvage services rendered to the bark *Kilby*, from the 8th to the 11th November. It was pleaded by the salvors, that between six and seven, A. M. on the 7th November, *The Black Eagle* observed *The Kilby* at anchor abreast of Deal; she steered towards her, and offered her services, which were declined, although the bark had lost her foretopmast and jibboom, in consequence of collision with a screw steamer. The wind and sea continued to increase, and on the following day *The Black Eagle* again steered towards her; and after the master of the bark had consulted with Lloyd's agent and the American consul, the latter of whom undertook that the bark should proceed to Margate Roads, it was agreed that *The Black Eagle* should tow her thence to London, for 45*l*. The bark, however, was unable to reach the Margate Roads, and a second agreement was then entered into to tow her from the Downs to London, for 55*l*. The master of *The Black Eagle* alleged, that on boarding the bark to carry out the agreement, he found that the windlass had been so broken since he was last on board, that it was unable to raise the anchor, upon which he declared that the second agreement was at an end. Considerable delay was occasioned by the exhaustion of the crew of the bark; but fresh hands were obtained, the anchor was raised by tackles, and the tug proceeded with the bark to the North Foreland, when a signal was hoisted on board the bark, and *The William Gunston* was engaged to assist in towing her to London, for 25*l*. Having, by the directions of the pilot, anchored on the night of the 10th, they arrived at the entrance of the Surrey Canal on the 11th. On the part of the owners it was contended that the agreements were valid and binding on both the tugs, the latter of which was engaged in consequence of the injury done to the windlass. In the course of the judgment, Dr. Lushington said: "A new arrangement was made to tow the vessel from the Downs to London, for the increased sum of 55*l*. In what way did that agreement become invalid? It is said in the act on petition, that it was in consequence of the damage which had been done to the windlass subsequently to the agreement itself. I must say that I demur upon that question of law. I entertain a very considerable doubt, whether, where a valid agreement has once been entered into to take a vessel in tow, and conduct her from the Downs to any specified port, any accident which occurs subsequently, not rendering it impossible to fulfil the

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of opinion that the principle there laid down, is well founded, and consistent with justice. The real question will be, whether what I said in the case of *The Kilby*, is applicable to the circumstances of the case now under consideration. The principle I there laid down is in these words: "Where there is an agreement to tow a disabled vessel from one port to another, it not being an ordinary towage service, I will not ingraft upon it additional salvage for any little assistance rendered." I am exceedingly glad, though I confess I am somewhat surprised, that I should have expressed myself with so much caution on that occasion, because, when delivering a judgment without its being previously written, it does not always happen that it is expressed in terms so guarded as these. I have made a distinction which I am about to explain, and I adhere to it. Now, let us consider these matters a little. It appears to me that there are two species of agreement which may be entered into by a vessel whose usual occupation it is to tow vessels from one place to another. One is, where she meets with a vessel disabled, and where she undertakes, for any sum agreed upon between the parties, to perform the service of bringing the vessel from one port to another, or to a place of safety. That may be called an extraordinary towage, because it is not in the ordinary occupation of the vessel, and not to be considered ordinary towage, which is of a different description. Ordinary towage is that which takes place for the purpose of expediting a vessel on her voyage, either homeward or outward. Where a master of a towing vessel, with his eyes open, sees another ship in any way disabled, and makes a bargain, cognizant of all the facts necessary to be known, he must be bound by that bargain, and any accident that may happen afterwards, any difficulty that may arise, any delay that may be interposed in the performance of that service, he, of course, must put up with, because he takes the chances, and makes a bargain to cover all such risks as these. Therefore, I repeat, that wherever a bargain is made in good faith for the towing of a disabled vessel, I will not ingraft upon it, whatever may be the circumstances that subsequently occur, any additional reward beyond that compensation which is stipulated to be paid by the mutual agreement between the parties.

agreement, cancels it. But I must look a little further. According to the statement of the salvors, the agreement having been entered into for 45*l.*, and afterwards, on the 8th November, converted into an agreement for 55*l.*, on the morning of the 9th November, Mr. Dear, having discovered the state of the windlass, says he put an end to the agreement. Now, I am a little puzzled to say that the agreement is cancelled by any observation which Mr. Dear thought fit to make, without its being addressed to the party who made the agreement with him, or the person who made it on his behalf." And in a further part of his judgment: "Where there is an agreement to tow a disabled vessel from one port to another, it not being an ordinary towage service, I will not ingraft upon it additional salvage for any little assistance rendered. If I did, there would be an end to agreements in such cases. The court would find great difficulty in solving such cases, if it did not solve them on principle. The principle that I lay down is, that where a vessel takes another in tow, she being disabled at the time, to convey her to her port of destination, she is bound to do all she can for her safe preservation till she gets there, and can claim no more than the agreement itself permits for rendering such service."

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But with respect to ordinary towage service, the case is different. There, all that is stipulated for on behalf of the vessel towing is, that she shall receive the ordinary reward which is paid in compensation for that towage service, and the reward is not apportioned to the performance of a salvage service that may become necessary afterwards. Therefore, I think there is a clear distinction between the two cases. Where a service has been commenced as an ordinary towage service, the vessel being in no distress, for the mere purpose of expediting the voyage, if it happens that a salvage service unexpectedly becomes ingrafted upon it, the towing vessel may not be bound to take the ordinary reward for a towing service. So much for the distinction between the two species of towing service.

Let us next consider whether there is an agreement for matters of this kind. An agreement to bind two parties must be made with a full knowledge of all the facts necessary to be known by both parties, and if any fact, which if known, could have any operation on the agreement about to be entered into is kept back, or not disclosed to either of the contracting parties, that would vitiate the agreement itself. It is not necessary, in order to vitiate an agreement, that there should be moral fraud; it is not necessary, in order to make it not binding, that one of the parties should keep back any fact or circumstance of importance. If there should be misapprehension, accidentally, or by carelessness, we all know that there may be what, in the eye of the law, is termed equitable fraud. What I have to do on the present occasion is — a tender having been made of 80*l.*, which more than covers the agreement itself — to see whether there ever was a subsisting agreement; and, if so, to see whether it has been invalidated by any circumstances that have occurred subsequently to the agreement. It appears that this was a valuable vessel, coming from Newfoundland, of the burden of 143 tons. At the entrance of the River Thames, she met, on the 26th of August, with extreme bad weather. She was compelled to slip from one anchor and cable, the foresail was split, and a new one was about to be bent when the steamer came up. It appears, on all hands, that these two circumstances were not disclosed to the master of the steamer; and the question therefore is, whether the omission to disclose these two facts, would or would not have an operation on the agreement which was afterwards made between the parties. The agreement was for a sum of 40*l.*, and no doubt it was up to the port of London, as sworn on the part of the salvors. I apprehend that the agreement may be said to be somewhat of a mixed nature. At that time, it is hardly to be considered an ordinary towage, not on account of the state and condition of the ship, but on account of the state and condition of the weather, which happened to be exceedingly tempestuous. I think whether the omission to state these facts would vitiate this agreement, or not, will depend upon whether they could, with any reasonable probability, affect the service about to be performed. I am of opinion that they might have an effect on that service, because I apprehend that, in coming up the River Thames, particularly during weather so tempestuous as this is represented to have been, the services might be delayed, and rendered much more arduous,

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much more difficult, in consequence of the want of ground tackle, which might be of the last importance to the saving of the vessel, and which might, to a certain extent, have governed the manœuvres of the steamer. I therefore come to the conclusion, that, as it might affect the performance of the service, the agreement was null and void *ab initio*.

Having come to that conclusion, it is not necessary to follow the remaining facts; and I have only to ascertain what ought to be the reward in the nature of salvage; because I agree with the argument addressed to me by Dr. Jenner, in entire accordance with what I said in the case of *The Kilby*, and which I now repeat, that, if there be an agreement for extraordinary towage, with a full knowledge of the state of the vessel, in that case, no addition to the reward ought to be made, whatever might be the circumstances. It seems in the present case, that the first hawser broke, and a second anchor and cable, by which the ship was then brought up, were slipped from; and it clearly appears to me that the vessel at this time was in very considerable danger of going on what is called the Shingle Sand. The windlass at that time had also become disabled: the vessel was a second time taken in tow. It is clear from the evidence, that the steamer did sustain considerable damage and straining in the performance of the service; but, upon this, I place very little reliance, because, whether it is a case of ordinary towage or extraordinary towage, the court must be on its guard in considering any accident which may happen to a steamer as a good ground for augmenting the rate of towage. I am of opinion that the vessel was rescued from considerable danger by this steamer. The principle which I have always endeavored to follow, is this: that, when steamers render salvage service, they are entitled to a greater reward than any other set of salvors who render the same service; and for this obvious and plain reason — in consequence of the power they possess, they can perform such services with infinitely greater celerity than other vessels, with infinitely greater safety to the vessel in danger, and frequently under circumstances in which no other assistance could by possibility prevail. I think I may exemplify that upon the present occasion. When the vessel was lying off Sheerness, it is quite clear that no power short of that of a steamer could have prevented this vessel, in all human probability, from being lost. In the present case, I must overrule the tender, and give the sum of 150*l*. When I see that the value of the property saved is 6,000*l*., whether the owners or the underwriters have this sum to pay, I think they ought to be well satisfied.

CASES
ARGUED AND DETERMINED
IN THE
ECCLESIASTICAL COURTS
AT
DOCTORS' COMMONS;
DURING THE YEAR 1853.

PREROGATIVE COURT.

In the Goods of DAVID DOWNER.

November 23, 1853.

*Practice — Destruction of Will by Testator whilst of Unsound Mind —
Probate of Draft.*

A became of unsound mind, and while in that state destroyed his will. He recovered, and gave directions for the preparation of another will, to the same effect as the will destroyed. Before this was prepared, he destroyed himself. Probate granted of the unexecuted draft of the original will.

DAVID DOWNER destroyed himself by drowning on the 10th April, 1853. A verdict of temporary insanity was returned. The deceased, in October, 1850, being then of perfectly sound mind, gave instructions for and duly executed his will. In the spring of 1851, he began to show symptoms of derangement of intellect, which continued to increase until the deceased was generally believed by his friends and relations to be of unsound mind; and in October, 1851, the deceased, being at the time very violent and wild in his conduct, suddenly left the room in which he had been sitting with his wife, and fetched the

In the Goods of Vincenzo Frederici.

will from a box in which he kept it, and attempted to destroy it by putting it in the fire, which, however, his wife on that occasion prevented; but in the following week, the deceased, being then of unsound mind, succeeded in destroying the will by forcing it into the fire with a poker. In the course of the following November, the deceased appeared in a measure to recover from his attack, and frequently expressed great regret at having destroyed his will; and in March, 1853, he called on his brother-in-law, F., and asked him whether he would get another will drawn up, the same as before; whereupon his brother-in-law asked him what he had done with the will; to which the deceased replied, "That time I was mad, I burnt it," and expressed great regret at having so done. F. promised that, when he had occasion to go to London, he would get another will prepared, to the exact purport and effect of the one destroyed; but on the 29th of the same month, F. again saw the deceased, and became satisfied, from the great alteration in his manners and appearance, that he was relapsing into his former state of madness. The deceased had always refused to see any medical attendant; but on the 9th April, when he was very much excited, his wife called in a surgeon to see him, who prescribed for him; but on the same day the deceased left his home, and did not return till the following day, when, after remaining at home for a short time, he again left the house, and then drowned himself. Several affidavits verified these circumstances. An affidavit, also, of the solicitor, with the original instructions and the original draft of the will annexed, proved the perfect accordance of this draft with the will of the deceased as executed.

Bayford moved the court to decree probate of the draft of the will, as containing the substance, purport, and effect of the will.

Sir J. Dodson. From the affidavits made in this case, there can be no doubt that the deceased was of unsound mind, and that while in that state he destroyed the will. There was, therefore, no *animus revocandi*, and I think the executors are entitled to probate of this draft.

CONSISTORY COURT.

In the Goods of VINCENZO FREDERICI.

November 25, 1853.

Practice — Will — Deed of Gift — Foreign Law.

An Austrian subject, in Milan, by a legal will, in which no executor was appointed, made C. M. universal legatee. C. M. was duly put in possession of the estate of the deceased by the authorities at Milan, and afterwards duly executed, according to the law of Milan, an irrevocable deed of gift of all her estate in favor of R. C., and shortly afterwards died

In the Goods of Vincenzo Frederici.

intestate. R. C. was duly put in possession of the estate in Milan. It being afterwards discovered that the testator was entitled to 1,000*l.*, under some proceedings in chancery in England, application was made to this court:—

Held, that letters of administration with the will annexed, limited to the estate taken under the deed of gift, might be granted to R. C., upon an affidavit of the Austrian consul, verifying the papers.

THE deceased was superintendent of the Imperial Royal Conservatory of Music, at Milan, and died in September, 1826, having first duly made his last will and testament, in conformity with the laws in force in Milan, without having appointed any executor, but having therein named Catharina Mella, spinster, universal legatee. She caused the will to be duly registered and deposited in the archives of the Imperial Royal Civil Tribunal of First Instance at Milan, and in the month of October, 1826, she was by order of that court, and pursuant to the will, duly put into possession of the estate and effects of the deceased, in Milan. On the 16th May, 1836, Catharina Mella duly executed, conformably to the laws of Milan, an irrevocable deed of gift of all her estate and effects in favor of her niece, Madame Rosa Castiglioni, wife of Paolo Castiglioni. This deed of donation was duly accepted by Madame Castiglioni and her husband, and in virtue thereof they were put in possession by the authorities at Milan of the estate and effects of the deceased there situate. On the 22d July, 1836, Mademoiselle Mella died intestate. It was afterwards ascertained that the said Vincenzo Frederici died possessed in this country of a sum of about 1,000*l.*, due to him under certain proceedings in the Court of Chancery.

Harding, Q. A., on affidavits of the foreign law, moved the court to grant letters of administration with the will annexed of the estate of the said Vincenzo Frederici to Madame Castiglioni.

Dr. LUSHINGTON. The difficulty which I feel in this case is, that nobody has made an affidavit as to the correctness of the documents before the court. The affidavits, no doubt, sufficiently prove the law of Austria, and the legal effect of these documents, assuming them to be correct. The application is very peculiar, and I think myself bound, therefore, to require some verification of the documents. There would, I apprehend, be no difficulty in obtaining an affidavit from Milan, or from the Austrian consul in England. I should be quite content; and I think the grant may pass, upon an affidavit of the Austrian consul being left in the registry, that he verily believes these documents to be what they purport to be. The grant must be limited to the estate taken under the deed of donation.

In the Goods of Thomas Dewell.

PREROGATIVE COURT.

In the Goods of THOMAS DEWELL.

November 5, 1853.

Will — Alterations — Acknowledgment of Signature.

The deceased desired the subscribing witnesses to place their names to his will, telling them of alterations therein made, but did not sign his name again: —

Held, a good reëxecution by acknowledgment.

THOMAS DEWELL died in August, 1853, leaving a will and codicil, both in his own handwriting, the will dated the 2d February, 1847, and the codicil the 13th November, 1850. Both will and codicil were duly executed; but in the will two interlineations had been made subsequent to the execution. In the margin, opposite the interlineations, were placed the initials of the two subscribing witnesses, but not the signature or initials of the testator; but at the end of the will, and below the names of the subscribing witnesses, the testator had written the words, "Republished and declared by the testator, with the words 'for her own use,' interlined in the last line of the first page, and the words 'in the names of the same trustees' interlined in the eleventh line of the second page, in the presence of us, who, in his presence, at his request, and in the presence of each other, have hereunto subscribed our names as witnesses, this 1st day of December, 1848." Immediately under this memorandum the two subscribing witnesses wrote their names, but the testator did not repeat his own signature. One of the witnesses was dead; the other deposed to the testator having, when producing his will, told them that he had made certain alterations in it, which he pointed out to them, adding that it was therefore necessary for him, the deceased, to republish his will; that he and his fellow-witness then signed their names at the bottom of the memorandum a second time, where the signatures now appeared, but the deceased did not himself affix his signature, neither had he written the memorandum in their presence.

Waddilove moved for probate of the will with the alterations. He submitted that the testator had acknowledged his signature in the presence of two subscribing witnesses, and so complied with the 21st section of the Wills Act.

SIR J. DODSON. I think this amounts to an acknowledgment, and the witnesses having put their names to the paper after the acknowledgment, the paper, as it now stands, is entitled to probate.

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CONSISTORY COURT.

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November 8, 12, and 15, 1853; and January 18, 1854.

Cruelty — Venereal Disease — Evidence of Adultery — Witnesses.

The probable chance of communicating the venereal disease is not sufficient to support a charge of cruelty; there must be proof of the communication of the disease.

The consorting with prostitutes by a married man raises the presumption of adultery, unless explained and rebutted by the character of the man; and where character is relied upon as a defence, and fails in that respect, the presumption is increased.

The evidence given by paid witnesses, *testes lupanares*, and accomplices, though liable to suspicion, must be fairly weighed.

THIS was a cause of separation by reason of cruelty and adultery, promoted by the wife against the husband. The proceedings commenced on the 18th January, 1853, and on the 19th February, a libel was brought in, pleading, so far as is material to this report, in the sixth article, that, for some time before, and at the time of, and after the period of his said marriage, the said Mr. Ciocci was suffering from venereal disease, for which he was attended by divers medical persons then practising at Brighton and elsewhere; that knowing himself to be so affected with venereal disease, and, in spite of the warning given him by one or more of them, very shortly before his marriage, he, the said Raffaele Ciocci, did, nevertheless, contract a marriage, and have sexual intercourse with his wife, the said J. M. B. Ciocci; that the said Mr. Ciocci did thereby communicate to the said Mrs. Ciocci the venereal disease, and her health was thereby seriously impaired for a considerable period; that by this course, as well as by the general unkind treatment of the said Raffaele Ciocci, Mrs. Ciocci was reduced to a state of extreme debility, which confined her to the house until the 14th March, 1851, when she quitted her said husband's house, and hath ever since lived separate and apart from him, and hath never since resided either in Brighton or London. 8. That ever since the marriage of the said Raffaele Ciocci and Mrs. Ciocci, in the month of January, 1851, the said Mr. Ciocci had been in the constant habit of consorting with prostitutes, both in London and in Brighton, generally late in the evening, and has been seen constantly walking and conversing with them both in London and Brighton. 9. That the said Raffaele Ciocci was in the habit of visiting at No. 3, Shaftesbury-crescent, Pimlico; that, on a Sunday afternoon, occurring very shortly after the marriage of the said Mr. Ciocci, he called at the said house, and caught hold of the female servant who opened the door, took indecent liberties with her person, endeavored to push her into the parlor of the house, and solicited her to let him have sexual intercourse with her. 11. That, on or about the 29th of January, 1851, Mr. and Mrs. Ciocci returned to Brighton, and went to

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reside at No. 8 Clarence-square, where the said Mr. Ciocci pursued his occupation as a professor or teacher of languages; that from and immediately after such his return to Brighton, Mr. Ciocci went frequently to a brothel or house of ill-fame, in Gardner-street, and also to a house in Carlton-street, in Brighton, where the party proponent expressly alleges and propounds that he habitually had the carnal use and knowledge of the body of a person known by the name of Polly Miller, and of the bodies of divers prostitutes unknown to the party proponent, and committed adultery with them. 13. That, in the evening of a certain Saturday, in the month of June, 1852, the said Raffaele Ciocci, who was then residing in apartments on the second floor in No. 16 Grosvenor-street West, Pimlico, in the county of Middlesex, met a certain female, known to be a prostitute, in the neighborhood of Eaton-square, and accompanied her to a house of ill-fame, in Chelsea, where he passed the night with her; that, on such occasion, the said Raffaele Ciocci slept naked and alone in the same bed with the said prostitute, and committed adultery with her. 14. That about a fortnight after the occurrence in the preceding article mentioned, and some time in the early part of July, in the said year 1852, the said Raffaele Ciocci again met the said prostitute late in the evening, in the neighborhood of Vauxhall-bridge road, and walked about with her for two or three hours, and took indecent liberties with her person; that, on divers subsequent occasions, late in the summer and in the autumn of 1852, the said Mr. Ciocci met the said prostitute in the streets of Pimlico and Chelsea, walked about with her, took indecent liberties with her person, and gave her money. 15. That, on or about the 2d November, 1852, the said prostitute, mentioned in the preceding article, received a letter from Mr. Ciocci, which letter is not now in existence, requesting her to call upon him at his lodgings, at No. 16, Grosvenor-street West, aforesaid, on the following morning; that, in consequence of such letter, she went to the said house and saw the said Mr. Ciocci, who asked her to accompany him to a magistrate, and deny having had connection with him, if questioned by such magistrate; that Mr. Ciocci thereupon accompanied her in a cab to the police station in Cottage-row, Pimlico, into which he entered, she, the said prostitute, remaining in the cab; that, after waiting for about half an hour, the said Raffaele Ciocci reëntered the cab, and accompanied her to the police station in Rochester-row, into which he entered, whilst the said prostitute remained as before in the cab; that, after an interval of some two hours, the said Raffaele Ciocci again reëntered the cab, in which he proceeded with the said prostitute to a house in Shaftesbury-crescent, and thence to his aforesaid lodgings in No. 16 Grosvenor-street, where the party proponent expressly alleges that the said prostitute remained alone with the said Raffaele Ciocci for two or three hours, during which time he, the said Raffaele Ciocci, had the carnal use and knowledge of her body, and committed adultery with her. 16. That, in the course of the few months immediately preceding the date of this libel, the said Raffaele Ciocci received another prostitute in his apartments on the second floor of the said house, No. 16 Grosvenor-street West,

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and there had the carnal use and knowledge of her body, and committed adultery with her.

On behalf of Mr. Ciocci, an allegation was brought in on the 31st May, pleading, in the fourth article: Whereas, in the thirteenth article of the said libel, it is alleged or pleaded, in words, or to the effect, that, "in the evening of a certain Saturday in the month of June, 1852, the said Raffaele Ciocci met a certain female, known to be a prostitute, in the neighborhood of Eaton-square, and accompanied her to a house of ill-fame in Chelsea, where he passed the night with her, naked and alone, in one and the same bed, and committed adultery with her;" and, whereas, in the fourteenth article of the said libel, it is alleged or pleaded, in words, or to the effect, that, "at some time in the early part of July, 1852, the said Raffaele Ciocci met the same female late in the evening, in the neighborhood of Vauxhall-bridge road, and walked about with her, and took indecent liberties with her person; also, that, on divers subsequent occasions, late in the summer, and in the autumn of 1852, the said Mr. Ciocci met the said female in the streets of Pimlico and Chelsea, and walked about with her, and took indecent liberties with her person;" now, the same is in great part (and in substance and effect altogether) untruly alleged, or pleaded, for the truth and fact was, and is, and the party proponent expressly alleges and propounds, that the said Mr. Ciocci, (who was and is, a member of a certain society called or known as "The Female Aid Society," established in Red-Lion-square, London, and who, from the year 1850, had taken, as he still takes, an active part in promoting the objects of that society,) some time in the said month of July, 1852, for the first time met and accosted a female, being the female meant and intended, obviously a woman of the town, and who has since been produced and examined as a witness in this cause, on behalf of the said Mrs. Ciocci, by the name of Fanny Alexander, but who then, in answer to his inquiry, stated to the said Raffaele Ciocci that her name was Helen Alexander, (in the said Vauxhall-bridge road;) and the party proponent further expressly alleges and propounds, that the said Mr. Ciocci, in so accosting and conversing as he did with the said female at the time and place, or on the occasion aforesaid, urged and endeavored only to persuade the said female to abandon her course of life, and put herself under the protection of the said society; and that it is utterly untrue that he then and there (or at any other time and place) took indecent (or any) liberties with the person of the said female, or that, at the time and place mentioned in the said thirteenth article of the said libel, (or at any other time and place,) he, the said Raffaele Ciocci, had sexual connection with the said female, or committed adultery with her. 5. Whereas, in the fifteenth article of the said libel, it is alleged or pleaded, "that on or about the 2d of November, 1852, the said prostitute, mentioned in the preceding article, received a letter, purporting to come from the said Raffaele Ciocci, which letter is not now in existence, requesting her to call upon him at his lodgings, No. 16 Grosvenor-street West, aforesaid, on the following morning; that, accordingly, and in consequence of the receipt of such letter, she

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went to the said house and saw the said Raffaele Ciocci, who asked her to accompany him to a magistrate, and to deny having had connection with him, if questioned by such magistrate; that the said Raffaele Ciocci thereupon accompanied her in a cab to the police station in Cottage-row, Pimlico, into which he entered, she, the said prostitute, remaining in the cab; that, after waiting for about half an hour, the said Raffaele Ciocci reëntered the cab, and accompanied her to the police station in Rochester-row, into which he entered, whilst the said prostitute remained as before in the cab; that, after an interval of some two hours, the said Raffaele Ciocci again reëntered the cab, in which he proceeded with the said prostitute to a house in Shaftesbury-crescent, and thence to his aforesaid lodgings in No. 16 Grosvenor-street West, where the said prostitute remained alone with the said Raffaele Ciocci for two or three hours, during which time the said Raffaele Ciocci had the carnal use and knowledge of her body, and committed adultery with her;" now, it is therein in part and in substance or effect, altogether untruly alleged and pleaded, for the truth and fact was and is, and in reference to and by way of explanation of what is so falsely pleaded, the party proponent expressly alleges and propounds, that, in the evening of a day early in the month of August, 1852, the said Raffaele Ciocci accidentally saw a fellow-countrymen of his, named G., conversing with a female, whom he immediately recognized as the female he had seen and conversed with in manner and to the effect in the said preceding article of this allegation, in the neighborhood of his (G.'s) lodgings in Gillingham-street, Pimlico, and into which lodgings the said G. presently took and entered with the said Fanny (or Helen) Alexander, though, at such time, the said G. was a candidate for the office of minister of the Italian Protestant Church in Newman-street, Oxford-street, London; that, in the month of October, the said Raffaele Ciocci mentioned what he had so seen to the Rev. Mr. Glennie, who reported the same to the Rev. Mr. Burgess, the said Rev. Mr. Glennie and the Rev. Mr. Burgess, being members of a committee for the selection of ministers for the Italian Protestant Churches in London. And the party proponent further alleges and propounds, that the said Raffaele Ciocci being thereupon desired by the said Rev. Mr. Burgess to ascertain the nature of the said G.'s connection with the said Fanny (otherwise Helen) Alexander, he sought her out for that purpose, and having, to wit, on the 2d November following, met her accidentally, (he being then in company with another fellow-countrymen, a Signor Patriarchi,) he requested her to come to his said lodgings, at No. 16 Grosvenor-street West, on the following day, which she promised to do; that accordingly on the following day, the 3d November, the said Fanny (or Helen) Alexander went to the said lodgings, and found there the said Raffaele Ciocci, and with him the said Signor Patriarchi, and when and where the said Signor Patriarchi, in the presence of the said Raffaele Ciocci, put certain questions to the said Fanny (or Helen) Alexander, touching or concerning her connection with the said G., which questions, as also her answers thereto, he put down in writing, to wit, on the paper writing hereto

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annexed, marked No. 10, (to which the party proponent prays leave to refer in part supply of proof of the premises;) and, to authenticate the same, added his signature thereto, as and where such signature now appears thereon; that, after this had been done, the said Raffaele Ciocci took the said Fanny (or Helen) Alexander with him in a cab to the police station in Cottage-row, Pimlico, and thence, at the recommendation of the police inspector in Cottage-row, to the police court in Rochester-row, as pleaded in the said fifteenth article of the said libel, but not for the purpose therein falsely pleaded, but for the purpose of having her sworn to the truth of the statement contained in her answers to the questions put to her as aforesaid, by the said Signor Patriarchi, relative to her illicit connection with the said G., though such his purpose was frustrated by the refusal of the magistrate at the said police court, to swear the said Fanny (or Helen) Alexander, to the truth of such statement; that the said Raffaele Ciocci thereupon went back in the cab to his said lodgings at No. 16 Grosvenor-street West, taking the said Fanny (or Helen) Alexander back in the cab with him as far as it went her way, but set her down at the corner of Windsor-terrace, Pimlico, that, as she said, being near where she lived, and where she desired to be set down; which having done, the said Raffaele Ciocci returned alone in the cab to his said lodgings, where and when the said Patriarchi then was expecting his return, and who spent the rest of the day with the said Raffaele Ciocci. And the party proponent further alleges and propounds, that in his way home from the said police court, the said Raffaele Ciocci called at a house in Shaftesbury-crescent, as mentioned in the said fifteenth article of this libel, and went into it for a short time to speak to an acquaintance of his who resided there, but that he left the said Fanny (or Helen) Alexander, whilst he was so in the said house, sitting by herself in the cab at the street door. And the party proponent lastly expressly alleges and propounds, that the said Fanny (or Helen) Alexander was never at the said house, No. 16 Grosvenor-street West, (at least, to the knowledge of the said Raffaele Ciocci,) save at the time and for the purpose, and under the circumstances hereinbefore pleaded; and that it is utterly false, as pleaded in the fifteenth article of the libel, that she was again or a second time at the house on the said day, or that then and there, as falsely pleaded, (or at any other time or place,) he, the said Raffaele Ciocci, had the carnal use and knowledge of the body of the said Fanny (or Helen) Alexander.

No. 10. On the 3d of November, 1852, the following questions were addressed to Miss Helen Alexander, and answered as follows:—

“1. Have you ever seen this gentleman walking with an other gentleman in Shaftesbury-crescent? — Yes.

“2. What day? — On the 4th August, 1852.

“3. If you see the gentleman, could you know him again? — Yes.

“4. Have you had any thing to do with him? — Yes; I went with him that evening.

“5. Did you stay with him all the night? — Yes.

“6. At what o’kloc did you left in the morning? — About 8 o’kloc.

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"7. What did he say to you during the night? — That he was going to leave that appartement; that next day he was going in the country to pay a visit to some friends.

"8. How much did he give you? — Five shillings.

"9. Have you seen him since that evening? — Yes, twice; once near Wauxhall-bridge, and an other time in Belgrave-road.

"10. What did he say to you? — That I am a very bad girl to go and tell to his friend every thing.

"11. Where he lived? — At 39 Gallingham-street, Pimlico.

"12. What part of the house had he? — The parlor, and the back parlor for his bedroom.

"13. Did you really sleep with him? — Yes.

"14. Have you been with him afterwards? — Yes.

"15. Did any one see you in the house? — Nobody.

"16. Have you seen this gentleman when you entered the house? — I did not; I thought he had gone away.

"17. Have you seen him before that evening? — Yes; and I told him all my life.

"18. What did he say to you? — He wished me to change my life, to go to service, and he said that he would send me in an establishment at Red Lion-square, where they would take care of me, and so find me a place.

"19. Were you glad to go and change your life? — Yes.

"Would you go now? — No.

"20. Make a description of the gentleman. — He is rather tall, and thin face, with large mouth, black whiskers, and bold.

"21. Have you ever had any thing to do with this gentleman? — Never.

"Witness: C. PATRIARCHI."

Phillimore and Deane, for the wife.

Addams and Twiss, for the husband.

Dr. LUSHINGTON. This case has been fully discussed at the bar, the argument occupying no less than four days, and I think that time has been well spent; for on the present occasion the veracity of many witnesses is called in question, and the evidence is contradictory to a very great extent, and much time must necessarily be consumed in the investigation requisite to the discovery of the truth. I must commence with stating a few of the admitted facts. The marriage took place on the 15th January, 1851. It appears that Mr. Ciocci was an Italian refugee, and for some years resident in this country; that he derived his maintenance by teaching languages, and for some time previous to the marriage, at Brighton. The lady was Jemima Mary Bacon Frank; she resided at Brighton, and possessed a considerable fortune. The ages of the parties do not distinctly appear, but the lady was the elder. There is enough in these circumstances to satisfy my mind, that, according to all probability, this was not a marriage likely to produce much happiness. The parties moved in a different

sphere of life, and the fortune was secured to the lady. The parties separated on the 14th March, 1851. What were the particular circumstances which led to this separation, are not disclosed by the evidence in the cause; they are very inconveniently left to the court to conjecture. For instance, I know no fact immediately preceding the 14th March, 1851, which caused the cohabitation to cease. However, cease it did, and I find Mr. Ciocci in London, and Mrs. Ciocci elsewhere. From this time to the commencement of this suit, in Hilary term, 1853, there is an entire blank, with one exception — that it appears that Mrs. Ciocci, by her agents, was endeavoring to find proofs to support charges of adultery against her husband. All I know is from the correspondence, whence it may be collected that Mr. Ciocci, in conformity with his declarations, did not endeavor to enforce cohabitation; and from the same source I form the conclusion, that Mrs. Ciocci had no knowledge of the special act of cruelty now charged, for such knowledge would be wholly inconsistent with her letters.

With respect to the charge of general cruelty and ill-treatment, I am of opinion that it wholly fails, and that the evidence brought to support it, is so entirely insufficient that it would be a waste of time to discuss it, and more especially because that evidence has no bearing on the specific act of cruelty charged in the libel.

I now address my attention to the sixth article of the libel, to the facts pleaded therein, and to the evidence adduced to substantiate the charges therein contained. The sixth article charges that Mr. Ciocci, before, at, and after his marriage, was suffering from the venereal disease; that he was attended by divers medical persons; that he was warned against the risk of communicating the disease if he then married; that he did marry, and did communicate the disease to his wife. If these averments are proved, I should, both on principle and authority, entertain no doubt in deciding that an act of legal cruelty had been committed. The proof necessary to establish such charges, is twofold — evidence that Mr. Ciocci himself had the disease, and evidence that his wife was also affected thereby. Mr. Watson is the first witness to whose testimony I shall advert, and I see not the slightest reason why I should not give the fullest credit to his testimony. This gentleman had been acquainted with Mr. Ciocci for three or four years prior to November, 1850. On the 17th of this month, Mr. Watson, who practised as a surgeon at Brighton, attended Mr. Ciocci, and found him suffering from the venereal disease, and so continued to attend him till the 27th December, when he was not cured, and when Mr. Watson left him in charge of Dr. Starr, who succeeded to his practice. Dr. Starr states, that Mr. Watson left Brighton towards the end of December, 1850, and was absent the greater part of January; that he succeeded to his practice, called upon Mr. Ciocci as a patient, and saw him. On the 10th January, Mr. Ciocci told Dr. Starr, that he had consulted a foreign gentleman, whose medicines had been of service to him. An inspection then took place, and Dr. Starr swears that Mr. Ciocci then had a venereal sore, which had been a bad syphilitic ulcer, but was then in a healing

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state. Dr. Starr further deposes, in answer to the sixty-third interrogatory, that it appears, from Mr. Watson's books, that the medicines furnished were mercurial pills, sarsaparilla, and nitric acid. Dr. Starr did not prescribe himself. To this evidence there is nothing whatever opposed — there is no contradictory, no conflicting testimony. I have no right, either legal or moral, to doubt either the veracity or the medical knowledge of these gentlemen. It is, therefore, proved beyond all question that Mr. Ciocci had the venereal disease for some time immediately prior to the marriage, and that he was in a healing state, but not healed, on the 10th January.

The next question is, whether he communicated this disease to Mrs. Ciocci. I hardly think it necessary to inquire whether there is evidence of his having been warned of the danger if he married in the state in which he is clearly proved to have been; for, I am of opinion that common sense, ordinary experience — I speak not of higher motives — must have suggested to him the probable consequences — the consequences likely to result in the ordinary course of things — from marriage under the circumstances proved to have existed; and if this were a point necessary to be determined, I should hold, and without doubt, that if a man married under such circumstances, and communicated to his wife the venereal disease, it was, to use the mildest term applicable to such conduct, such utter recklessness of the health and comfort of his wife, that if he did communicate such disease, he was guilty of cruelty in the eye of the law; and I should hold this upon the principle, that, whoever does an act likely to produce injury, and the injury follows, can never excuse himself by saying that he hoped a probable consequence might, by some peculiar good fortune, not follow. But if warning was necessary, warning he had, and ample warning too, from Mr. Watson, who told him it was impossible for him to marry until he was quite cured — impossible for him to marry in the state in which he was. This was his state on the 27th December. What his state was on the 10th January, five days before the marriage, I learn from Dr. Starr. It would be a mockery of all that is decent, honest, or honorable to say that Mr. Ciocci was then in a state to consummate marriage. I will not debase the office I hold by weighing degrees of risk. To marry, and consummate a marriage with the slightest chance of communicating such a disease, was a crime and a sin.

But to revert to the question, "Was the disease so communicated to the wife?" Let me again refer to Mr. Watson. He says: "I was still in Brighton, in February, 1851. He told me he was married, and wished me to prescribe for his wife. I did not know her; I never saw her; when I called on the 17th February at his house in Clarendon-square, she refused to see me. I prescribed for her from his description of her ailment." Before I comment on the evidence bearing upon this point, I must express my regret that the evidence on this article is left in the doubtful state in which I find it. If Mr. Watson had been asked for what disease he prescribed — what his prescription was — the case would have been comparatively, if not entirely, clear one way or the other. This most unfortunate omission

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has left this most material part of the evidence in doubt, from which it will not be easy to extricate it. Before I express my opinion as to the effect of this evidence, I will consider Mr. Seabrook's. Mr. Seabrook was the medical attendant of Mrs. Ciocci both before and after marriage. On the 17th February, he attended upon her. She was suffering from inflammation of her legs, and generally out of health. He prescribed for such inflammation, and about the second week in March she recovered. During the early part of his attendance she mentioned having some complaint in the parts of generation, which he attributed to natural causes. On interrogatory, he says that this complaint lasted about two weeks, and then ceased, as Mrs. Ciocci stated. He never attended her for the venereal disease; she never complained of it. His prescriptions were for a different disorder. The question is, what conclusion the court ought to draw from the evidence of these medical persons considered together. First, I am of opinion, that it being clearly proved that Mr. Ciocci was suffering under the venereal disease, and so late as the 10th January, and the marriage taking place on the 15th January, the probability is that he communicated it to his wife. Secondly, I think this probability strengthened by the fact of Mr. Ciocci consulting Mr. Watson as to the health of his wife — not as to her having the venereal disease; that is not so. Thirdly, further evidence is furnished by the fact of the discharge spoken to by Mr. Seabrook. But against these presumptions, strong as they are, there is evidence which weighs in a contrary direction, and the absence of evidence of still greater importance. The fact of Mrs. Ciocci having another disorder, and being attended by Mr. Seabrook, to whom no disclosure was made, but above all, the circumstance, the fact that Mrs. Ciocci recovered from the symptoms, whatever they were, without any medicine for the venereal disease, as far as appears by the evidence, must have considerable weight. If she had taken that infection, I apprehend that she could not be relieved from its effects without medicine adapted to the cure of that disease. Mr. Seabrook gave her none. What Mr. Watson prescribed the examiner has most unfortunately, I repeat, left in the dark. Moreover, I do not find in Mrs. Ciocci's answers, (and the fact might have been stated in answer to the second article,) nor elsewhere, when she discovered that she had such disease, nor how she was cured. Strong as the probabilities may be, I cannot presume the affirmative; and this being so, I am compelled to come to the conclusion that it is not proved by affirmative evidence that Mrs. Ciocci was infected with the venereal disease. I think, therefore, that the charge of cruelty fails; for I am of opinion that it is essential to support that charge, that the *corpus delicti* should be proved; and here there is not adequate proof; and if there be not adequate proof of the fact, however great the moral delinquency of consummating a marriage with the probable chance of communicating the venereal infection, I am not prepared to say that so doing constitutes legally an act of cruelty, as understood in these courts. In order to constitute an act of legal cruelty, there must be, in my opinion, an actual communica-

tion of the disease, and the running the risk is not sufficient.¹ I must, therefore, pronounce that the charge of cruelty is not sustained.

Before I address my attention to the evidence adduced to support the charge of adultery, I must notice that there is an extraordinary gap in the history of this case, accounted for neither in plea nor evidence—at least, with any accuracy. I presume that this lady continued to live somewhere apart from her husband from March, 1851; that he came to reside in London, and follow his occupation as a teacher of the Italian language—this I am left to presume, as it is nowhere distinctly stated; and that some intimation having in some way reached Mrs. Ciocci or her friends, the inquiry was instituted which appears by the evidence of Edser and others. This has led to the employment of policemen, of persons also who had been in the police, and to the examination as witnesses of common women of the town. Whenever persons of this description, such as Owen and others, are employed for money to procure evidence to establish any fact, all that they do or say must be watched with great vigilance, and for divers reasons. Such persons are naturally anxious to attain their object, and generally to a certain extent, their pecuniary reward depends, or is by them supposed to depend, on their success; and the very nature of their employment, the constant mixing with the lowest characters, does not tend to make them the most scrupulous agents. Great care and caution, therefore, is necessary; but such caution must not be carried to an extravagant length; for we all know that upon evidence so procured the lives of many men formerly depended, and even at this day all but life does frequently depend. Somewhat similar observations apply to the other class of witnesses, the *testes lupanares*, as we are in the habit of calling them, especially when they are accomplices; but if voluntary association with such persons should be proved or admitted, such objection will come with an ill grace, and be entitled to much less weight, if urged by a person so circumstanced.

From all the circumstances, from the probabilities, from the conduct generally of Mr. Ciocci, from corroboration if any, the court must form the best judgment it can, remembering always that if there be reasonable doubt the balance should preponderate in favor of innocence and against guilt. I cannot pass over altogether in silence the extraordinary nature of some of the interrogatories addressed to the witnesses on the libel. Amongst other parts of the eighth and ninth interrogatories, the witnesses are asked whether Mr. Ciocci is not a member of the Church of England. What that has to do with the question to be decided in this case I am at a loss to conceive. It cannot, I trust, for an instant be supposed that the same measure of justice will not be meted out to all parties litigating

¹ It was argued, on the authority of *Popkin v. Popkin*, 1 Hagg. 765, note, that the having connection with his wife by a husband infected with the venereal disease was an act of cruelty, though the disease might not be communicated.

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in a court of justice, whatever may be their religious persuasions, nor that any party will derive any advantage because either from education originally, or from adoption, he professed one faith or another. No impression could possibly be made upon the mind of the court by such an interrogatory. Then there is an interrogatory as to the religious faith of Mrs. Ciocci, and whether some Roman Catholic priest or cardinal has not been in communication with her, and that generally without any reference to this suit. I cannot conceive what is the legitimate drift of these interrogatories; but be the drift what it may, there is not the least evidence touching this cause produced by them. I shall have occasion hereafter to comment upon some of the other interrogatories, and will now only observe that, for all useful purposes, I think they might have been greatly reduced in number.

But to return to the evidence. Following the order of the libel, the ninth and tenth articles plead what I will, though perhaps incorrectly, term the solicitation of chastity of Jane Legg. I am of opinion that the evidence of Jane Legg alone, unsupported by other testimony, cannot be safely relied on to establish the charges; but, to prevent misapprehension, I will observe that it is possible that such evidence may have some bearing upon other parts of the cause, though not sufficient to establish the charge here made. I do not say that it will have such bearing, but that it may. The next case which presents itself for consideration is that of Charlotte Thomas. This case is most materially distinguished from that of Jane Legg; for the acquaintance, and, I may say, intimacy, with Charlotte Thomas, is not only not denied, but admitted, and the sole question is, whether that acquaintance was of a criminal or innocent nature. The explanation offered by Ciocci, is to the following effect, as appears from the interrogatories addressed to Charlotte Thomas, from the forty-second to the forty-ninth inclusive: that he, Ciocci, was connected with a society called the Female Aid Society, in Red Lion-square; that from pure and laudable motives he induced her to return to her mother, then living at Chelsea; and it must be inferred from the interrogatory, though not so stated therein, that she was a prostitute at the time; and, further, that Ciocci's conduct was free from all improper motives, and was, to use the words of the interrogatory, paternal. Some of these circumstances, though not as relates specially to Charlotte Thomas, are afterwards put in plea. This being so, the questions will be, first, is there a *prima facie* case of adultery with Charlotte Thomas established? Secondly, is that case rebutted by proof that the acquaintance was guiltless, and the conduct of Ciocci free from blame? The sixteenth article of the libel charges adultery with a prostitute, not named, during the few months preceding the date of the libel, namely, the 19th February, 1853, at Ciocci's lodgings, No. 16 Grosvenor-street West. It is clear from the exhibits, as well as from the interrogatories, that Ciocci's legal advisers were aware that Charlotte Thomas was to be examined. On the sixteenth article Owen deposes, that towards the end of the time he was employed, which would be December, 1852,

he saw Charlotte Thomas at the window of Ciocci's lodgings, the second floor of No. 16 Grosvenor-street West. Charlotte Thomas gives her account of her intercourse with Ciocci, at the commencement of which she was about seventeen years of age. It began at a dining-house in Lisle-street, which appears to have been frequented by Italians and prostitutes. It was said in the course of the argument that Ciocci was driven by the want of pecuniary means to resort to such places. I cannot say that argument was convincing to my mind, for I do not believe that frugal accommodation cannot be procured in this metropolis without the contamination of such associations. I do not look with a very favorable eye upon these *symposiums* of Italian refugees and prostitutes. However, I make these observations to show that the argument did not escape me.

But to proceed with Charlotte Thomas's evidence. She did not see him afterwards for some time, but on returning to lodge in Lisle-street, (about November, 1852,) she met him in the street, and went to his lodgings in Grosvenor-street West, several times, and, according to her statement, committed adultery with him. This at once raises the question whether she is credible or not; the issue at once becomes, is Charlotte Thomas speaking true or false? First, let me consider what she states on cross-examination. In answer to the forty-second interrogatory she negatives all knowledge of the society. She says: "I do not know any thing of such a society as the interrogate 'Female Aid Society.' I am not aware that the ministrant ever acted for any such society. I am not aware that he has been the means of restoring any females of a certain class to a moral course of life." Therefore, we must conclude from this, that Ciocci did not make the communication to her. In answer to the forty-third interrogatory she makes a statement which requires great consideration; she says: "The ministrant's acquaintance with me did commence by asking me (after some inquiries about my history and circumstances) whether I would not consent to go home to my mother's, if, at his intercession, she would consent to receive me. I did say that I would consider of it, and, upon seeing him a day or two afterwards, say to him that I would be glad to go home. He did then immediately accompany me to my mother, who then lived at Chelsea, and induced her to receive me into her house. He has been a kind friend to me, and taken a great interest in my welfare. He could not have done more than he has done for me if he had been my father." Now, to be sure, such evidence, coming from the mouth of a witness produced by Mrs. Ciocci to prove adultery, is not only exculpation, but high commendation, and, I must say, it is somewhat startling. Here is a lady examined upon the 19th and the 21st April, and she is brought up on the 22d for cross-examination; she then makes a statement altogether inconsistent with her previous deposition. I have no means whatever of ascertaining how this was effected, but there can be no doubt that something had taken place during the intervening time. It is impossible for me to say which is the truth, but I do say that, by some means or other, the witness was induced to make a different statement; and I think it probable, that

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if the examination had not been interrupted, such an answer as that to the forty-third interrogatory would never have been given. If I am to believe that evidence, the conduct of Mr. Ciocci, with respect to Charlotte Thomas, was highly praiseworthy. It is, however, a little strange, that, in the very next breath, this witness refuses to answer whether Mr. Ciocci had had a criminal connection with her or not. "I refuse to answer upon oath the question whether he has ever had sexual intercourse with me, or taken indecent liberties with me. He certainly has behaved most gentlemanly and paternally towards me. I am sorry for having told the examiner what I did when I was with him the first day to be examined in chief." One would have supposed that there could have been no difficulty in answering this question, when the answer to the preceding part of the interrogatory is borne in mind, and the paternal conduct of Ciocci so distinctly averred. I must follow up this evidence a little further. In answer to the forty-seventh interrogatory the witness admits an interview with Mr. A., the solicitor, in consequence of a letter (which has not been produced) addressed to her that she was to go there; the date of this interview was the 10th February, at which time the suit had been commenced, though the libel was not given in until the 19th. She further admits that she then declared that Ciocci was totally innocent, and had restored her to her mother; and she admits paper A to have been a statement made by her, and signed by her. Paper A is to this effect:—

"10th February, 1853. I, Charlotte Thomas, declare that I first saw Signor Ciocci, with three or four other gentlemen, at the restaurant, in Lisle-street, Leicester-square. I was then in company with a Mr. M., an Italian. I did not speak to Signor Ciocci on this occasion, but I afterwards saw him when going into the restaurant alone; he was coming down stairs; we had some little conversation together, when he asked me if I would like to go home to my mother's, if he interceded with her on my behalf. I said I would consider of it, and let him know. I saw him a day or two afterwards, and told him I should be glad to go home, and he immediately accompanied me to my mother's, at Chelsea; and when my mother removed to Sydenham, I accompanied her thither, but it being so very dull, I determined to come again to London. At this time, my sister, now living with me, was in service in Sloane-street, where she remained altogether about three months, when she left her situation, and came to live with me, at 35 Lisle-street, since which time my sister has assisted me in the business of a dressmaker. But I solemnly declare that not the least impropriety of conduct whatever has ever taken place between myself and Signor Ciocci. My first meeting with Signor Ciocci was about nine months ago; and I voluntarily, and without the least expectation of any reward for so doing, make this statement: that Signor Ciocci has occasionally given me small sums of money, but out of pure kindness, and most certainly, not for any improper purpose.

"CHARLOTTE THOMAS."

Now, singular enough, the witness is not asked whether that statement was true or not, a question which would have been most important to this cause, and most pertinent to the issue, but she is only asked whether or not it was her signature. This statement, marked A, does not and cannot contain the words spoken by the witness, though it may be that she stated the substance. It was procured, I do not say unduly, for the purpose of discrediting this girl should she be produced as a witness for Mrs. Ciocci. Looking at all these circumstances, it is very manifest that the evidence of this witness must be handled with much circumspection. The object of Mr. Ciocci must be to show that she is not deserving of credit; it must be, not to set her up, but to set her down. Her evidence in chief as to adultery is not contradicted directly by her evidence on interrogatory, but it is contradicted by her statement to Mr. A, and so far her testimony is impeached. It will not, however, necessarily follow that her evidence is to be wholly rejected on this ground, for I take it to have been decided that a witness may, under certain circumstances, be believed in part and discredited in part, that it is not necessary to reject her in toto.

It is somewhat singular, however, that, looking at the sixteenth article of the libel, no interrogatories were put as to the visits in Grosvenor-street West, for such numerous visits, if deposed to, were not very consistent with the defence set up. I think, too, the court was entitled to some information how this paper A was procured. That matter might have been cleared up by the attorney or his clerk. I shall have to comment in another part of this case upon parties obtaining statements from witnesses, and although I do not say that this should not be done, yet I do think that the court should be fully informed how it happens, and of all the circumstances under which such paper was obtained. There is one other omission which I think particularly deserving of notice. The gist of Mr. Ciocci's defence to this charge is, not to deny his acquaintance with this girl, but to admit it, and to claim credit for having restored her to her mother. How comes it that this defence was not pleaded, and the mother examined? The mother came up with the daughter when she was examined. Surely any intercourse between a married man separated from his wife, and a prostitute of this description, does require the best explanation which can be given. I regret to say that I am left wholly without evidence as to any thing which may have occurred between the examination and the cross-examination of Charlotte Thomas; but when I look at the inconsistency of her evidence given upon interrogatory with that given in her examination in chief, I cannot but entertain a grave suspicion that this witness had in the mean time been tampered with. This suspicion is confirmed on reference to the interrogatories administered to the witnesses examined on the libel.

The first interrogatory is in these words: "Let each witness designed hereto be asked, 'On your oath, have you not seen one or more of your fellow-witnesses since the completion of his, or their examination?' 'If you admit that you have, which have you seen?'"

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Has such witness, or witnesses, made no disclosures whatever to you as to the tenor of his, her, or their deposition in chief, or of the interrogatories administered to them, or of his, her, or their answers thereto?' 'If any witness has made any such disclosure, say who, by what name.' 'On your solemn oath, are you wholly unapprized of the tenor of the interrogatories which you may suppose are about to be administered to you?' If nay, 'What have you been apprized, and by whom, in respect thereto?'" Now, this interrogatory was not administered to this witness. The first administered to her was the third, and not the first. From this it is clear as daylight that the witness had been tampered with, and that this interrogatory was not administered to her lest it should become known to the court by whom she had been so tampered with. I wish, indeed, I could by any means discover by whom it had been done; he should most assuredly answer, if not here, at least before another tribunal, for such proceeding. It has been a shameful attempt to deceive the court, and to prevent its arriving at the truth by a suppression of this interrogatory.

I have now at some length discussed the evidence on this sixteenth article; before I come to any conclusion, I shall go through the rest of this case, and for this reason, that as the defence turns so mainly on the character of Mr. Ciocci, on his being actuated by pure and benevolent motives in his intercourse with this and other girls, I wish to ascertain, as far as I am able, what is the effect of the evidence with respect to Mr. Ciocci's conduct and motives with regard to women of this description. I postpone, therefore, for the present, pronouncing any opinion on this charge. With regard to the charge of adultery, at a brothel at Brighton, with a woman named Polly Miller, it is supported by the evidence of Juliana Beck alone. Whether she is mistaken as to the identity of Mr. Ciocci, or not, I need not stop to inquire, for I could not safely proceed to any conclusion adverse to Mr. Ciocci, on her evidence alone, unless corroborated by further testimony. The additional articles charge adultery with Polly Miller, in Market-street, in February or March, 1853; but of this also there is no evidence, save that of Mary Ann Hadley, and she is a common prostitute. The interrogatories do, indeed, show that Polly Miller must have been in communication with Mr. Ciocci's legal advisers, but this circumstance alone is not a sufficient corroboration, though it shows that Hadley is correct in the account she gives of herself and Polly Miller. It would not, I think, be safe or consistent with justice to found any conclusion adverse to Mr. Ciocci on this evidence. All I say is, that it is not sufficient alone.

Before proceeding to the case of Fanny Alexander, I shall, very briefly, notice the eighth article, and the evidence thereon. The eighth article pleads the habitual consorting with prostitutes, and constantly walking with them, both in Brighton and London. Owen's evidence is to the following effect — that he commenced watching Ciocci on the 6th October, 1852, and continued to do so up to the 3d December. During this period, he saw Ciocci conversing with prostitutes no less than seven times, both in the morning and in the evening.

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There can be no reason to doubt the general correctness of this evidence, because the conversing with prostitutes is a part of Mr. Ciocci's own case. It is his case in plea; it is his case in interrogatory. I do not here stop to inquire whether the mode of consorting with prostitutes spoken to by Owen, is consistent with the motives to which Mr. Ciocci makes claim. I reserve that consideration till I have discussed the evidence on Mr. Ciocci's allegation. The fact of so consorting is proved and admitted; whether explained satisfactorily or not I must determine. The *onus probandi* is upon Mr. Ciocci.

I am thankful to say I have reached the last case, namely, the charge of adultery with Fanny Alexander. But as the discussion of this portion of the case occupied by far the greater part of the time of counsel in the argument, so I fear it will be necessary for the court to enter with considerable minuteness into its examination. This charge is contained in three articles — the thirteenth, fourteenth, and fifteenth — and Fanny Alexander has herself been examined. She is, according to her own account, a prostitute, and aged about twenty. On the thirteenth article she deposes to her first criminal connection with Ciocci somewhere about May, 1852, at a brothel in Chelsea, where she knows not, to describe, nor even the street in which it is situate. On the fourteenth, that she frequently met Ciocci in Windsor-terrace Vauxhall-road, and that he offered to take improper liberties with her. On the fifteenth the great controversy has arisen. The time to which the witness is speaking will from other parts of the case appear; from her evidence, it would be in the summer or autumn of 1852; it was in the beginning of November. She states that Mr. Ciocci was ignorant of her residence in Westminster; she asked him to direct to her at 7 Stafford-place, Pimlico; she received a note desiring her to call upon him at No. 16 Grosvenor-street West; she went, and afterwards accompanied him to the police office in Cottage-row, then to Rochester-row; he told her to deny ever having had connection with him; then they went to No. 15 Shaftsbury-crescent; then back to Grosvenor-street, and there he had connection with her.

This being the substance of her evidence in chief, let me next consider what she has said upon interrogatory. It is a fact in the case, that Mr. B., the solicitor for Mrs. Ciocci, employed Mr. Edser, a builder at Vauxhall, and a friend of his, to use means to obtain evidence in support of the charges against Mr. Ciocci; that through Mr. Edser's means various persons were so employed, as Owen, Russell, and others. Now, the seventeenth interrogatory inquires whether the witness (Alexander) knows any thing of these persons, and amongst others of G., and then the witness states that he had slept with her one night. This fact must be borne in mind in the examination of the subsequent evidence. The answer to the twenty-first interrogatory, which relates to the Red Lion-square society, is a negative, save that she says that Mr. Ciocci asked her if she would like to change her course of life, telling her that if she would be a good girl he would get her a situation. It is no easy matter to sift the evidence where there are parts which are true and parts which are not, and it is difficult to discover what parts are supported by the evidence; but I must

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not shrink from the task. The twenty-second interrogatory runs thus: "On your oath, is it not the fact that the ministrant afterwards, having seen you in company with an Italian named G., did speak to you concerning the said G., and ask you what you knew of him, and make an appointment with you to go to his house, in order to receiving a statement what you knew in respect to the said G.?" Let us pause a little to consider what the witness is called upon to answer, and what she has answered. She is interrogated in the words which I have read. It seems intended to ask her whether the seeing her with G., and the appointment to come to Grosvenor-street, were not almost contemporaneous. But what are the facts of the case? What are the dates? Why, the G. business was, according to Ciocci's own case, on the 4th August, and the appointment was not made till the 2d November. Now, I must say that the interrogatory, as put, appears to me calculated to lead to confusion, to say nothing else of it. But what is her answer to it? "On my oath, it is not the fact that the ministrant afterwards, having seen me in company with an Italian named G., spoke to me concerning the said G., and made an appointment with me to go to his house, in order to receiving a statement of what I knew in respect to the said G." It is quite clear that both the examiner and the witness understood the interrogatory as I and every person of common sense must understand it, namely, that the appointment was immediately subsequent.

The twenty-third interrogatory and the answer are important. The witness admits seeing Patriarchi in Grosvenor-street, on the 3d November, but she denies that the object related to G.; denies any statement in writing by Patriarchi; admits going to Cadogan-place; denies that Ciocci left her at the corner of Windsor-terrace, and went on alone in the cab. Now, this witness having admitted in her answer to the twenty-third interrogatory that she had been staying at the house of Miss J., at Boxmoor, whither she had been sent by Mr. Edser and Owen, the court is bound to exercise the greatest vigilance in the examination of her evidence; for although circumstances may sometimes render it necessary or advisable thus to take charge of witnesses, yet it must necessarily attach to their evidence a degree of suspicion. But whatever may be the value of her evidence, the question mainly put in issue by her answer to the twenty-third interrogatory is, whether she did or did not, after leaving No. 15 Shaftesbury-terrace, go with Ciocci to his lodgings in Grosvenor-street West. The affirmative is sworn to by Alexander, Edser, Owen, and Horsey. The question I am now to try is the mere fact; the inference therefrom must of course be considered hereafter. Mr. Ciocci has counterpleaded this fifteenth article of the libel, in the fifth article of his allegation. The fourth article of the allegation counterpleads the thirteenth of the libel; but on this article no witness has been examined. The fifth article pleads, that early in August, Ciocci saw G. conversing with a female, whom he, Ciocci, knew, as pleaded in the fourth article—that is, with a prostitute whom he, Ciocci, had before accosted in the month of July; and that he saw G. take her to his lodgings in Gillingham-street. As to this there is no evidence, save that Alexander admits

she had slept with G. It further pleads that G. was at that time a candidate for the office of minister of the Protestant Italian Church; that two months afterwards, namely, in October, Ciocci mentioned this fact to Mr. Glennie; and that at the desire of Mr. Burgess, he, Ciocci, sought this prostitute, Fanny Alexander, out, and on the 2d November accidentally met her when he was in company with Patriarchi. So that three times, in July, in August, and in November, Ciocci accidentally meets this girl—*accidentally* as pleaded, yet not *inopportunately*, for the second time Ciocci obtains proof against G., whose appointment he was opposing; and the third time he has the good fortune to find her when he wanted her to make oath against G., and perhaps also for another purpose—to exculpate himself. These matters require close sifting. First, does this statement as to the early meetings agree with the evidence of Fanny Alexander? Other evidence there is none. Her evidence does not at all agree with the plea of Ciocci's allegation, except that there was a meeting in July, 1852, in the Vauxhall-road. The time is of no importance, but as to the result of the meeting, there is a total difference. I cannot collect from the plea that there was any other meeting than those in July, August, and November; but Fanny Alexander deposes to several.

On the seventeenth and twenty-second interrogatories this witness gives an account of her connection with G., but it differs wholly from Ciocci's plea; for she states that G. was walking with Ciocci, when G. quitted him and joined her. Ciocci's account is, that he accidentally saw them together, and recognized her. He states that this took place in August, early in the month; and so, according to Ciocci's statement, the matter sleeps till October, when he mentions it to Mr. Glennie, according to his own account. Mr. Glennie says Ciocci was opposed to the selection of G. as minister, (this would be prior to August,) but with reference more to his incapacity. Unfortunately Mr. Glennie cannot say at what time—August, September, or October—the communication of G.'s alleged incontinence was made; so that I must take Ciocci's own account, that he did not make this communication for two months. Mr. Burgess deposes to the charges against G. made by Ciocci in October, 1852. Mr. Burgess did not desire him to ascertain the nature of the charge; Ciocci proposed to substantiate it. Mr. Burgess does not support the plea as laid; but this does not appear to me of importance. It matters little whether he asked Ciocci to prove the charge, or whether, after what passed, Ciocci volunteered to do so. Ciocci afterwards sent in a document, but not No. 10, which was never seen by Mr. Burgess or Mr. Glennie. All this with Mr. Burgess occurred at the end of October or the beginning of November.

Now comes the question, how the meeting of the 3d November took place—of no importance, indeed, of itself, but as relating to the credit due to Mr. Ciocci's statement, and the credit due to the witnesses, of very great moment. I must begin with the 2d November. According to Patriarchi's account, on the 2d November he and Ciocci went in search of Fanny Alexander. Where they went, this witness does not say, nor at what time, day or night; I mean in his examina-

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tion in chief; but inquiries were made of a policeman, who has not, however, been examined in the cause. They met the object of their search, and Ciocci gave her an envelop with his address, and made an appointment for the next morning. On cross-examination, Patriarchi states that the meeting with Alexander was in the evening, and somewhere about Eaton-square. As the policeman is not examined, all this stands on the evidence of Patriarchi alone, save as hereinafter excepted. It clearly appears from the seventy-sixth interrogatory, which is in these words: "Did you not, in or about the month of October or November last, and when particularly, see the ministrant speak to a police constable in or near Stafford-place South? Did he not give to such policeman his card? After the ministrant had left the policeman, did you not ask of him, the policeman, what the gentleman, meaning the ministrant, wanted? Did he not then inform you that the ministrant wanted him to make inquiries about a female who had given her address, 7 Stafford-place South, and that he, the ministrant, wanted such female as a witness?" And, also, incidentally from Owen's evidence in answer to that interrogatory, that Alexander had given to Ciocci her address as at 7 Stafford-place South; and further, that Ciocci had given the policeman his card. It is clear, therefore, both from the interrogatory and from the answer, that Ciocci was aware, before the evening of the 2d November, that Alexander had given her address as in Stafford-place. Not one word of this is to be found in Patriarchi's evidence in chief. He is entirely silent as to any address being known, and his answer to the seventh interrogatory is to the same effect. Two things are, then, clear—that Ciocci knew of the address, and spoke to the policeman, and gave him his card; but, whether Ciocci and Patriarchi met Alexander accidentally that same evening, and whether he wrote her a note, are different questions.

The next task is, to examine the evidence on the other side. S. French says, on the fifteenth article: "I knew Alexander from August to Christmas, 1852. Alexander once asked me to allow a letter to be taken in for her at the house where I then lodged, No. 7 Stafford-place South. I consented, believing I should be doing her a service by so doing. I cannot at all speak to the date of this; it may have been at about the middle of the time during which I was in the habit of meeting her. Very soon after I had consented to the letter being taken in, a foreign gentleman, whom I believe to have been Mr. Ciocci, called at the said house; it was on a Sunday evening that he did so. I saw him; he asked for the girl, Alexander. I told him she did not live there, but if he wrote a letter to her that she would have the letter; and he then went away, and early in the same week, I think it was on the Tuesday or the Wednesday next following the said Sunday, a letter came to the house, addressed to Alexander. It came there by the public post. I did not take it in, but I got it, and took it to Alexander. I gave it to her the same evening. We read it just at the corner of Eccleston-square; we both read it under a gas-lamp. The letter was a letter from Ciocci to Alexander; to the best of my recollection, its contents were to appoint Alexander to go

on the following morning to Ciocci's lodgings, 16 Grosvenor-street West, and it told her to come neatly dressed, and to dress herself as like a maid-servant as possible. It also added, that if she could not come, she was to write to Ciocci, to tell him so; and it inclosed an envelop directed to Mr. Ciocci, 16 Grosvenor-street West, for her to put a letter into, if necessary, to inform him of her not coming. I gave the letter to Alexander, and I believe she put it into her pocket, and took it away with her. I think the letter was directed to Miss Ellen Alexander." If this evidence be at all consistent with the truth, it is clear that it cannot easily be reconciled with Ciocci's statement of the accidental meeting, or with Patriarchi's evidence. I am well aware that this witness is not a person of character. Of that, hereafter. I will now see how her account tallies with that of Alexander. Unfortunately, Alexander's evidence, as to the commencement of this article, is taken down very briefly. The examiner did not, and probably could not, foresee of how much importance detail would have been. As far as it goes, her evidence corroborates that of French, and contradicts that of Patriarchi, and on the twenty-second interrogatory in the strongest terms. The result is, that Patriarchi, as to the accidental meeting, is confirmed by no one; she is by several, and by the fact that Ciocci did know Alexander's address.

I resume my examination of Patriarchi's evidence, especially that part which cannot be contradicted save by Alexander. Patriarchi was examined on the 31st May, 1853. His answer to the third interrogatory shows his state of knowledge, on the 2d and 3d November, as to matters now agitated. He was asked to give evidence as to what happened, he says, between Ciocci, himself, and the girl Alexander, in that affair about G. He was then ignorant of the charges of cruelty and adultery. Ciocci never spoke to him of those, only that he had been accused of being with the girl, Alexander. But it was only a few days before that he told him of this — long, consequently, after the 2d and 3d November, 1852. Patriarchi, therefore, proceeds with the knowledge of and for the purpose of substantiating the charge against G., but wholly ignorant, on the 2d and 3d November, of the charges against Ciocci. In answer to the fourth interrogatory, he says: "All the questions were written down before Alexander came into the room." In chief, he says: "I put certain questions, all of which I wrote down on paper, and then took down her answers. Those questions were concerning her connection with G." He, then, identifies paper No. 10. Making all just allowances for an imperfect knowledge of the English language, there are still some circumstances deserving notice as to this paper. First, was the date, the 4th August, stated by the witness, or merely a suggestion from Ciocci? In answer to the fifth interrogatory, he says: "The girl gave the date of her own accord. I asked her, if it was the 4th August, 1852, and she said, 'Yes.'" In other words, the date is Ciocci's own, suggested to Patriarchi. In the ninth answer she is made to say, that she met G. twice afterwards; and in the tenth, that he said she was a very bad girl to go and tell his friend every thing. But did she do so, and did the meeting with G. occur, according to the evidence furnished

by this statement? The sixteenth question suggests, that the girl had seen Ciocci that evening. The plea, however, represents that Ciocci accidentally saw G. pick up the girl Alexander; and the first question represents Ciocci and G. as walking together; and must not this be true, if there be any truth in the whole matter? How could the girl tell Ciocci all this, if Ciocci's plea be true? How did she know that G. was a friend of Ciocci, unless she saw them together? How could she make a communication to Ciocci, except she saw him? And not a word of this is said in Ciocci's plea. The plea represents that he saw her three times accidentally; not a word of more; and, then, I draw this conclusion, that this paper No. 10 does not agree with the plea, deliberately drawn from Ciocci's instructions; and the fact of that difference is remarkable.

To go on with Patriarchi and the paper. He deposes that Ciocci took the girl in the cab for the purpose of her being sworn to the answers as to her connection with G. Questions 17, 18, 19, and 21, all relate to Ciocci. First, then, I ask, what has this to do with the charge against G.? Patriarchi, according to his own statement, knew nothing of the charge against Ciocci. Next, who suggested these questions, and for what purpose? Patriarchi, I have said, knew at that time of no charge against Ciocci. Why suggest it? His answer to the fifth interrogatory is this: "I put the question No. 21, the last on the exhibit No. 10, of my own accord; my motive was because, if any one should in a matter of that sort want to know how Mr. Ciocci got that information, it should not be fancied he got it in an improper way. Mr. Ciocci was present when I put the question. I had not put a question of the same purport to Mr. Ciocci previously. I put it entirely after my own mind. I did not think it possible that he might have had sexual connection with Alexander. I did it to prevent mischief—to prevent G. doing the same against him. It was intended by such questions to ask Alexander if she had ever had sexual connection with Ciocci." A most singular reason for such a question, to prevent G. saying the same against Ciocci. But even assuming Patriarchi's account to be true, what is to be derived from this document in support of Ciocci's case? Here is an unfortunate girl brought into the presence of two persons, leagued together for objects of their own, to take away the character of one man absent, and to set up the character of one present; and this girl is to be examined on a set of questions already written down, expressly framed to carry out the views of the parties. All this being done, the document itself is kept in *retentis*—is not proved to be even in existence by any one but Patriarchi—is never shown to Mr. Burgess or Mr. Glennie, for whose especial use it was to be procured. I ought also to add that the answers are so framed as to induce a strong suspicion, that, if even written about the time, namely, the 3d November, they are framed by the very persons who wrote the queries. One instance, and that not an immaterial one, that these answers emanated not from the girl herself, is the date. The answer to the eighteenth query bears strong marks of suggestion, if not of fabrication. I have no hesitation in saying that such a

document, so procured, cannot affect the credit of Alexander, or of any witness; it is a document disgracefully procured, and, if in existence at the time, disgracefully held back. To attempt to discredit a witness by such means as these is, I believe, almost unparalleled in any court of justice.

But I will now refer to Alexander's evidence as to what passed on this memorable occasion, when this secret conclave was held in Grosvenor-street West. Alexander in chief is silent as to this matter; the fifteenth article would not lead to it. On the twenty-first interrogatory, she negatives all knowledge of the Red Lion-square society; and if this answer be true, what becomes of the answer to the eighteenth query in paper No. 10? On the twenty-third interrogatory, Alexander denies that she went to the house to state what she knew of G. She denies that Patriarchi wrote down any statement of hers as to G. With respect to the further question, where she went with Ciocci on leaving his house on the 3d November, she answers affirmatively, and in accordance with the interrogatory. Patriarchi, however, swears, that though she went away with Ciocci, she never returned to Grosvenor-street, nor saw Ciocci again that day, for that he spent the remainder of the day, after Ciocci's return, alone with Ciocci. Then who is to be believed as to the fact whether Alexander did so return or not — Patriarchi, or Edser, Owen, Horsey, and Alexander? West, who drove Ciocci, is not examined. Here are four witnesses to one, and three of them not of the description which Alexander is. I will again postpone the answer till I have examined a main position in Mr. Ciocci's defence, his connection with the Red Lion-square society, his acting as agent for that society, and his consequent intercourse, for pure purposes, with prostitutes.

I must observe, however, by the way, that even the establishment of such connection does not of necessity prove innocence. No one could contend that a support of such societies, however laudable in itself, constituted a panoply of purity. I fear mankind is too prone to error, too liable to inconsistencies, not sometimes to yield to those very temptations from the effects of which they were anxious to shield others. Still, a *bonâ fide* connection with such a society, a *bonâ fide* and prudent furtherance of its objects, would go a long way to account for conduct otherwise suspicious, if not explained.

I am very anxious to do Mr. Ciocci justice in this matter; it is most important, as relates to his character, and may have no slight bearing on the decision of this cause. I shall, therefore, state the plea, and then the proof. This important averment is to be found in the fourth article of Ciocci's allegation, and it pleads that Ciocci was and is a member of a certain society known as "The Female Aid Society," in Red Lion-square; that from 1850 he had taken, as he still takes, an active part in promoting the objects of that society; that he accosted and conversed with Fanny Alexander, and that he urged and endeavored only to persuade her to abandon her course of life, and put herself under the protection of the said society; and then the article denies adultery. The witness to this part of the article is Mr. Smith, the secretary to that society, who deposes that

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he had known Ciocci for eight or ten years, since he, Smith, was secretary to the Protestant Association, when Ciocci came to him, he, Ciocci, being about to publish a book under some such title as "The Cruelties of the Inquisition." He says: "So far as voluntary efforts are concerned, he was a member of that society. He has undertaken to distribute tracts in connection with that society. He has not been nor is he a member of that society in any other way than in naming persons from whom I might obtain subscriptions. The tracts which he distributed are addressed to women with a view of inducing them to enter a penitentiary. He frequently called on me to ask me to introduce cases which he might find into the penitentiary. He has from 1848 up to the present time taken an active part in promoting the objects of that society. I cannot at all depose to any particular case by the name of Fanny or Helen Alexander. He frequently, from 1848, up to the present time, has spoken to me of his endeavours to persuade females of the town to abandon their course of life, and to place themselves under the protection of the society. As to any thing which has occurred between him and any female, I cannot of my own knowledge depose, except that, from what I know of him, I disbelieve that any thing improper occurred. His object was purely benevolent."

I do not find it very easy to ascertain with precision the effect which ought to be attributed to this evidence. In answer to the eleventh interrogatory, Mr. Smith deposes as follows: "It is only from his own statements, and from the hearsay of other persons, that I know of the producent's exertions in promoting the objects of our society." It is clear that this evidence does not come up to the plea; and the most I can make of it is, that Mr. Ciocci conversed with Mr. Smith as to the objects of the society; that he suggested subscribers; that he undertook to distribute tracts; and in that satisfied Mr. Smith that he took an interest in the welfare of the society. But this matter must be more deeply sifted, so far as I have the materials to enable me so to do. The object for which the connection is pleaded, is to account for accosting Alexander in the Vauxhall-road. I should have been glad of further explanation. I know nothing of this society save from this evidence; but I really doubt whether such societies are so affluent in their resources, and at the same time have such paucity of applicants, that it is usual to send out agents into highways and by-ways to bring in persons to receive the benefits of such institutions. However, still this may be so. Let us see how it works in the case before us. There are two girls so accosted, and so induced to reform — Charlotte Thomas and Fanny Alexander — and they both retort by charging the pious agent with commission of adultery. Not one of them comes to the institution, and both of them swear they never heard of it till under examination. Both admit that Mr. Ciocci spoke of reform. Charlotte Thomas, not in chief, but on interrogatory, deposes that Mr. Ciocci took her back to her mother; this fact comes out, as I have said, on interrogatory; and, under the circumstances, it is much less credible on interrogatory, and the mother is not produced to prove it. I cannot say that these efforts have been so suc-

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cessful in my judgment, as to afford matter for unmixed congratulation to the society.

Another step in this case. Does this evidence of Mr. Smith, and this interest in the society, call for such association with prostitutes as is described by Owen in his evidence on the eighth article? Was it part of the vocation for Mr. Ciocci to be drinking with Polly Miller at the Devonshire Arms, at the corner of Titchbourne-street, and to be constantly accosting prostitutes? I confess these things do somewhat surprise me, who have so little evidence as to the proceedings of these societies. If I am to believe that the acting as agent of this society, removes all suspicion from associations the most suspicious, I am to expect that the agent is "*integer vitæ scelerisque purus*;" at least, to the ordinary extent of fallible man. Does Mr. Ciocci, by the evidence in this case, appear to be such a character? Can I pronounce him so to be? What facts are there proved in this case, beyond all reasonable doubt? That Mr. Ciocci in December, 1850, and in January, 1851, had the venereal disease, derived from association with some of these females. That, not being assured of perfect cure on the 10th, he married on the 15th. Is this all? How stands Mr. Ciocci's character for veracity, and regard for the solemn obligation of an oath? Is it possible to read the evidence and his answers, and avoid coming to one conclusion? I will not waste time with noticing the argument, that the salvo to Mr. Ciocci's conscience is contained in the words—the magical words, "*as articulate*,"* which I am sorry to say have served, and, as appears, are likely to serve again, as a cloak for disguising the truth, and the promulgation of falsehood. Can I doubt the evidence of Mr. Watson and Dr. Starr? If they have spoken the truth Ciocci has not. I am bound to look to character for the defence—his character; and they depose that he was, at the very time suffering from venereal disease. And now for the result of this investigation into the alleged connection with the Red Lion-square society, which is brought forward as the explanation of all Mr. Ciocci's intercourse with women of the town, and as a defence against all the charges. I am of opinion that the defence wholly fails; that the attempt to ascribe to Mr. Ciocci the pure and laudable motives which no doubt govern the society itself, is not supported by affirmative evidence; and that any presumption arising from the evidence of Mr. Smith, is rebutted and annihilated by the proved conduct and character of Mr. Ciocci himself. All honor to those, who from pure and laudable motives, dedicate their money and their time to rescue from vice and misery, the outcasts of this world; but nothing can be more disgusting than when an ostensible connection with such a society is paraded for selfish motives, to conceal corrupt indulgence, and defeat justice. I trust that I have, with due patience and care, examined all the evi-

¹ The sixth article pleaded, "that for some time before, and at the time of, and after marriage, Ciocci was suffering from venereal disease, for which," &c. The answer denied "that either for some time before, or at the time of, and after the period of his marriage, he was suffering from venereal disease, as articulate."

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dence to establish the alleged explanation and justification of Mr. Ciocci's conduct; and I have not forgotten that he is a foreigner, though after an eight years' residence here that is an element of little importance. I am of opinion that the explanation and attempted justification wholly fail.

And now the question which I have reserved remains for determination; and I seek to find the bearing and effect of this failure on the evidence to prove adultery. As to Charlotte Thomas, there is her own oath, supported by the evidence of Owen, who saw her in Mr. Ciocci's room. I am of opinion that her evidence in chief is not shaken by her cross-examination, but confirmed, for I deem it to be perfectly clear that between her examination and cross-examination she has been tampered with; and as to the supposed restoration to her mother, I am not to be deceived by the mere words of the witness on such a cross-examination, when the best proof, the evidence of the mother, is withheld. Intercourse, though said to be not illicit, is the very foundation of Mr. Ciocci's defence; and as I think the averment of benevolence and philanthropy wholly fails, it follows that such admissions corroborate the evidence to actual guilt. Similar observations apply, though more strongly, to the case of Alexander. Patriarchi is contradicted by both French and Alexander as to the arrangement for the meeting of the 3d November; by Edser, Owen, Horsey, and Alexander as to the return to Grosvenor-street; and so far from his evidence being confirmed by paper No. 10, it bears in my mind strong suspicion of fabrication. I have no doubt that Alexander did return to Grosvenor-street; and if that be so, the false defence set up is the strongest corroboration of the truth of her evidence. If there for purposes wholly unexplained, to what other conclusion, according to the dictates of common sense, and every day's experience, could a court of justice come? I pronounce for the separation, on the ground of adultery with Charlotte Thomas and Fanny Alexander, and condemn Mr. Ciocci in the costs.

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Common Law.

ACCEPTANCE.

Of a Bill of Exchange.] See BILL OF EXCHANGE. CONTRACT.

ACCIDENT.

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ACCORD AND SATISFACTION.

See *Nicklin v. Williams*, 549.

ACCOUNT.

Of Sales and Profits.] See PATENT.

ACCOUNTS.

1. *Adjustment of.]* Where parties agree to settle accounts, by ascertaining the exact balance, and for that purpose produce vouchers and give information, if it should afterwards turn out that there were errors in that account, a court of equity will open it up and set it right; but otherwise, if the parties met, not to ascertain the exact balance, but to agree to take a gross sum as such balance. In both cases, however, fraud will vitiate the settlement or compromise. *Mackellar v. Wallace*, 62.
2. *Compromise.]* Circumstances where the court held that, from the dealings between the parties, the nature of the accounts, and mode of settlement, such settlement must be taken to have amounted to a compromise, and was, therefore, conclusive against all parties it concerned. *Ib.*
3. *Costs in.]* Where the plaintiff, instead of appealing against the decree directing an account, went in before the master, and proceeded a certain length in verifying the accounts, but, on the master making a separate report, stopped short and took exceptions, which being overruled, he appealed against both the original decree and the order overruling the exception, and succeeded in reversing the decree: —
Held, he must, nevertheless, pay the costs of the proceedings in the master's office, with respect to that portion of the bill ordered to be dismissed. *Ib.*

ACKNOWLEDGMENT.

See WILL.

ACTION.

1. *Malicious Arrest.]* Allegation that the defendant, upon a writ of *ca. sa.*, properly issued at his instance, for a large amount, but a great part of which had been afterwards satisfied, had falsely and maliciously, and without any reasonable or probable cause, procured the sheriff to issue a warrant to take and keep the plaintiff, &c., and

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had falsely and maliciously, and without any reasonable or probable cause; procured the said warrant to be indorsed to levy the larger amount; whereupon the plaintiff had taken and detained for four weeks, and whereby he had suffered in his business and credit:—

Held, upon demurrer, to disclose a sufficient cause of action; for it was alleged that the act was malicious, &c., and such an act might injure the plaintiff, as by rendering it more difficult for him to raise means to satisfy the debt really due; and it was alleged, in effect, that it had conduced to some part, at least, of his detention in prison. *Churchill v. Siggers*, 200.

2. *Notice of.*] A magistrate acting in the execution of his office is, by the 11 & 12 Vict. c. 44, entitled to notice of action, although he acts maliciously and without reasonable and probable cause. *Kirby v. Simpson*, 469.

3. In actions against magistrates for acts done in the execution of their office, the judge is to decide whether notice of action is necessary, and the jury are not to determine the question of *bona fides*. *Ib.*

4. *Judge's Order.*] An action does not lie for disobedience to a judge's order, whether drawn up by consent or hostilely. *Hookpayton v. Bussell*, 478.

5. A defendant having been arrested in respect of a debt from which he was protected by an order of the insolvent court, applied for his discharge to a judge at chambers, when the following order was made: "Upon hearing the attorneys or agents on both sides, I do order that upon payment by the defendant of 5*l.* forthwith the defendant be discharged, the defendant hereby undertaking to pay the rest of the debt and costs," by certain specified instalments:—

Held, that a declaration for breach of this undertaking was bad, although it also stated that the order was made with the consent of the plaintiff and the defendant. *Ib.*

6. *Right to adjacent Soil.*] The withdrawal of any part of the stratum to the support of which the owner of the adjacent soil or house thereon is entitled, is a cause of action, as an injury to the right, although no immediate damage ensues; and no fresh cause of action accrues by the occurrence of subsequent damage. Therefore, to an action for damage caused by such withdrawal, it is a good answer that a prior action has been brought for damage consequent upon the wrongful act, and an accord and satisfaction agreed to and performed between the parties. *Nicklin v. Williams*, 549.

For Breach of Contract to employ.] See MASTER AND SERVANT.

Notice of Action.] See NOTICE.

ADMINISTRATION.

Foreign Law.] An Austrian subject, in Milan, by a legal will, in which no executor was appointed, made C. M. universal legatee. C. M. was duly put in possession of the estate of the deceased by the authorities at Milan, and afterwards duly executed, according to the law of Milan, an irrevocable deed of gift of all her estate in favor of R. C., and shortly afterwards died intestate. R. C. was duly put in possession of the estate in Milan. It being afterwards discovered that the testator was entitled to 1,000*l.*, under some proceedings in chancery in England, application was made to this court:—

Held, that letters of administration with the will annexed, limited to the estate taken under the deed of gift; might be granted to R. C., upon an affidavit of the Austrian consul, verifying the papers. *Frederici, in re*, 601.

See ASSETS.

ADULTERY.

See DIVORCE.

AGENT.

See BANKING COMPANY. PAYMENT.

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ALTERATION.

See INSURANCE. WILL.

AMENDMENT.

Common Law Procedure Act.] Section 222 of the Common Law Procedure Act only authorizes such amendments to be made by a judge at Nisi Prius as are necessary for determining the real question in controversy between the parties, that is, the real question which the parties intended to have tried, not any question which may come in controversy in the course of the trial, and which was not in controversy before. What the real question in controversy is, is a matter of fact to be determined at the trial by the judge, from the pleadings and the evidence.

The declaration alleged, that the defendant fraudulently represented to the plaintiff that the reason why the defendant had dismissed P. (a clerk) from his employ, was the decrease in the defendant's business, and that the defendant recommended the plaintiff to try P., and knowingly suppressed the fact that P. had been dismissed on account of dishonesty. The evidence was, that although P. had been guilty of dishonesty while in the defendant's employ, and the defendant had not mentioned that fact to the plaintiff, yet the reason for his dismissal was that given by the defendant; and whether the defendant had fraudulently suppressed the fact of P.'s dishonesty had not been in controversy between the parties before the trial, but only whether the defendant had given the true reason for dismissing P.:—

Held, that the judge at Nisi Prius had rightly refused to allow the declaration to be amended by striking out the allegation that the defendant fraudulently represented the reason of dismissal, and substituting for it an allegation that the defendant fraudulently suppressed the fact that P. had been guilty of dishonesty. *Wilkin v. Reed*, 312.

Of Indictment.]

See INDICTMENT.

See FORMER RECOVERY.

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APPORTIONMENT OF RENT.

See LANDLORD AND TENANT.

ARBITRATION.

See AWARD.

ASSAULT AND BATTERY.

See FORMER RECOVERY.

ASSETS.

1. *Real and Equitable.*] A was indebted to B, in a sum secured by A's bond. B died, leaving A his executor, who accepted and acted as such. The bond continued unpaid at A's death, when A's books showed he had regularly entered up against himself, not only the principal but the interest, as it accrued:—

Held, in a court of equity, that the debt remained unchanged as a specialty debt, the same as if a stranger had been appointed executor. *Turner v. Cox*, 72.

2. A, seised of real estate (two plantations) in Barbadoes, was indebted to B and Company, a firm; and, by his will, devised such real estate to trustees, subject to his debts, and directed them to consign the crops of these plantations to B. and Co., until debts due by him to them, should be paid off in a certain manner. A had previously (being indebted to D) granted D a bond, which was still unpaid at A's death. B and Co. claimed a preferable lien over the two plantations, or at all events to be ranked equally with D, and excepted to the master's report, (which postponed them to D,) on the ground that A had, by his will, made the plantations equitable assets:—

Common Law.

Held, that the statute 5 Geo. 2, c. 5, s. 4, made all real estate of deceased persons in the West Indies, legal assets, in such a way as to give the same priority to specialty creditors against the real estate, as they always had against the personal estate, and that it was out of the power of testator to change the legal distribution of the assets by directing an equal distribution, which the testator had attempted to do in the present case. *Turner v. Cox*, 72.

Held, further, as to the preferable lien claimed by B and Co., though that point was open to reasonable argument, yet, as it did not seem to have been raised in the court below, it could not be entertained in the Court of Appeal. *Ib.*

ATTACHMENT.

See AWARD.

ATTORNEY AND CLIENT.

Retainer of Attorney.] A count against the public officer of a joint-stock company stated, that on the 30th November, 1844, it was agreed between the plaintiff and the company, that from the 1st January, then next, the plaintiff, as the attorney and solicitor of the company, should receive and accept a salary of 100*l.* per annum, in lieu of rendering an annual bill of costs for general business, transacted by the plaintiff for the company, and should and would, for such salary of 100*l.* per annum, advise and act for the company on all occasions in all matters connected with the company, (the prosecuting or defending of suits, and the preparation of bonds or other securities, being excepted, the plaintiff being allowed in respect of such matters the usual charges of an attorney :) and it alleged, that in consideration that the plaintiff had, at the request of the company, promised to perform the same on his part, the company promised the plaintiff to perform and fulfil the same in all things on their part, and to retain and employ him as such attorney and solicitor of the company on the terms aforesaid: and assigned for breach, that the company, disregarding their promise and agreement, did not nor would continue to retain or employ the plaintiff as such attorney and solicitor of the company on the terms aforesaid, but, on the contrary, wrongfully, and without any reasonable cause, dismissed and discharged the plaintiff from such employment and retainer, and from thence hitherto have wholly refused to retain or employ him as such attorney and solicitor, or to pay him the salary aforesaid, by reason of which the plaintiff has wholly lost and been deprived of the said salary, and also of divers profits which he might have derived from such employment: —

Held, affirming the decision of the Exchequer Chamber, which reversed the judgment of the Court of Common Pleas, and in conformity with the opinions of eight out of nine of the judges who gave their opinions, that the plaintiff was entitled, after verdict, to judgment upon the above count. *Emmens v. Elderton*, 1.

AUCTION.

Sales by.]

See WARRANTY.

AWARD.

Attachment for Non-Performance of.] Two actions of *A v. B*, and *B v. A*, and all matters in difference between the parties, were referred, the costs of the reference and award as to the said actions, to be in the discretion of the arbitrator. The award found that there was due from B to A 52*l.* 18*s.*, and directed that B should bear his own costs in the action brought by him against A, and also A's costs of that action; that A was entitled to recover 52*l.* 18*s.* in the action brought by him against B, and that B should pay that sum, on demand, to A, together with A's costs of the action; and that each party should bear his own costs of the reference, and half the expense of the award.

The action of *B v. A* had not proceeded beyond the writ, and consequently there were no costs due therein to A.

The agreement of reference having been made a rule of court, the rule being intituled, "In the matter of the arbitration between A and B; *A v. B*," and the 52*l.* 18*s.* and

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taxed costs of the action of *A v. B*, having been duly demanded, the court granted an attachment against *B* for non-payment of those two sums. *Pike v. Newman*, 296.

BAILMENT.

See CARRIERS.

BANKING COMPANY.

Authority of Manager.] The local manager of a branch bank, while engaged at the bank, suggested to a lady who had a deposit account, that higher interest might be obtained for her money if she purchased two houses for a sum which would pay off a mortgage held by a third person upon them, and also a lien held by the bank. She assented, and gave him her deposit note, for which he gave her a fresh deposit note for the difference between the amount of the former note and the purchase-money, and retained the residue for the purpose of making the investment. This money the local manager appropriated to his own use, and the bank refused to bear the loss :—

Held, in an action against them, that they were liable, the jury having found that the manager intended and induced the lady to believe that he was acting as the agent of the bank, and also, that as local manager he had authority from the bank to make an assignment of an equitable mortgage. *Thompson v. Bell*, 536.

BARRATRY.

1. *By Part-Owner.*] Barratry may be committed by the master of a ship who is part-owner. *Jones v. Nicholson*, 542.

2. Where the master, being part-owner, fraudulently sold the ship and cargo, and applied the proceeds to his own use :—

Held, that this was a loss insured against by the words, "barratry of the master," and, per *Martin, B.*, also by the words, "all other perils, losses, and misfortunes." *Ib.*

BEQUEST.

See WILL.

BILL OF EXCHANGE.

1. *Acceptance.*] In an action by indorsee against indorser, although there is no averment of acceptance, and no plea putting it directly in issue, if there be a traverse of the presentment, it is open to the defendant to disprove the acceptance when it appears that the bill was not presented personally to the supposed acceptor, but only at a banker's, at which it purported to be made payable by the supposed acceptance, provided it appears that the bill was indorsed by the defendant before the supposed acceptance was upon it, which is a question the jury should decide. *Weeton v. Hodd*, 278.

2. *Forged Acceptance.*] So held in a case in which the bill had been drawn and indorsed in blank by the defendant, and by him delivered to his partner, who had afterwards forged the acceptance, and passed it to the plaintiff; it appearing the bill had been indorsed and delivered by the defendant before any acceptance was upon it. The defendant having admitted his drawing and indorsement, and promised to pay :—

Held, that though this might be evidence of due notice of dishonor, it was no evidence of such an admission of liability as would prevent him from taking an objection to the presentment. *Ib.*

3. But held that this should have been left to the jury; and as it had not been so, a new trial would have been granted but that the verdict was entered by consent for the defendant. *Ib.*

4. It being admitted by the plaintiff that the indorsement was before the supposed acceptance :—

Held, that the defendant was entitled to a verdict on the issue as to the presentment.

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No point having been made at the trial, on the issue as to notice, the defendant was not entitled to a verdict on that issue. *Weeton v. Hodd*, 278.

5. *Quære*, whether he might have been, if the point had been taken. *Ib.*
6. *Evidence of Dishonor.*] In an action by indorsee against indorser or drawer, any declaration by him, amounting to an acknowledgment of liability or to a promise to pay, made to any party applying on behalf of the plaintiff, is good evidence of notice of dishonor. And although the defendant is called to disprove the notice, yet, if the question be left to the jury on his credibility, and they find for the plaintiff, the court will not disturb the verdict. *Jones v. O'Brien*, 283.
7. *Without Drawee.*] *Semble*, that an instrument drawn in the form of a bill of exchange, but without the name of a drawee, is void as a bill of exchange. *Peto v. Reynolds*, 404.
8. If this be so, the case of *R. v. Hawkes*, 2 Moo. C. C. 80, was wrongly decided, and *quære* of *Gray v. Milner*, 8 Taunt. 739. *Ib.*
9. *Ratification.*] A party gave the following instrument:—

“ Cameroons, September 3, 1852.

“ Exchange for £200 0 0.

“ At sight of this my third of exchange, the first and second of the same tenor and date being unpaid, please to pay to S. M. P., Esq., or order, the sum of two hundred pounds sterling, value received, and place the same, as by letter of advice of the 3d September, to the account of A. R.”

Across this was written, in the handwriting of A. R.,

“ Accepted, S. R., Esq., Shin-lane, Bedminster, Bristol:”—

Held, per curiam, that, assuming that this instrument was void as a bill of exchange, still, if it were shown that the person whose name was written across it, had promised to pay the amount, and so ratified the act of the drawer, he would be liable on that promise. *Ib.*
10. Per Alderson, B., and Martin, B., that in such case the instrument would be a promissory note. *Ib.*
11. Per Parke, B., the 8th volume of Taunton's Reports is of apocryphal authority. *Ib.*

See INFANT; PAYMENT.

BILL OF LADING.

When affected by Parol Testimony.] See EVIDENCE.

BILL OF PARTICULARS.

See PATENT.

BONA FIDES.

See ACTION.

BOND.

Breach of.]

See SURETY.

BOUGHT NOTES.

See CONTRACT.

BOUNDARIES.

Evidence of.]

See EVIDENCE.

CARRIERS.

Special Contract.] The course of business as to carrying pigs by a railway from H. to L., which the plaintiff S. well knew, was that on the delivery of the pigs, the

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porter who received them gave the drover of the owner a consignment note, which was signed both by the drover and the porter; that the drover then presented the consignment note to a clerk, who gave him a duplicate of a cattle note, to be presented on the delivery of the pigs at L. In the consignment note, there was a notice that the company would not be liable for any articles, unless they were signed for by their clerks or agents. S., after having delivered a large number of pigs in the usual manner, sent six more to the station by X., who was going to take some of his own. At the station, X. got the usual notes for his own pigs, and told M., a porter, that the six pigs belonged to S., and M. said that he would take care of them; but no consignment note was made out or signed. The pigs were never delivered:—

Held, in an action brought by S. against the railway company for not delivering the pigs, that he could not recover, as there was no evidence that M. had any authority to contract for carrying the pigs, except in the usual manner, or that he held himself out as having such authority. *Slim v. Great Northern Railway Co.* 297.

Liability of.]

See DAMAGES.

CASES EXAMINED, DOUBTED, &c.

<i>Aspdin v. Austin</i> , 5 Q. B. Rep. 671, commented upon, and distinguished, . . .	1
<i>Bearcliffe v. Dorrington</i> , 4 De Gex & Smale, 122, examined, . . .	123
<i>Borrodaile v. Brunton</i> , 8 Taunton, 535, doubted, . . .	398
<i>Dunn v. Sayles</i> , 5 Q. B. R. 685, commented upon and distinguished, . . .	1
<i>Emmens v. Elderton</i> , 6 Com. B. Rep. 177, affirmed, . . .	1
<i>Fawcett v. Cash</i> , 5 B. & Ad. 904, commented upon, . . .	6
<i>Fewings v. Tisdale</i> , 1 Exch. R. 295, distinguished, . . .	8
<i>Friar v. Grey</i> , 5 Eng. Rep. 480, affirmed, . . .	27
<i>Gray v. Milner</i> , 8 Taunton, 739, doubted, . . .	404
<i>Harris v. Wall</i> , 1 Exch. R. 122, doubted, . . .	560
<i>Hay v. Bickerstaffe</i> , 2 Modern, 34, examined, . . .	31
<i>Johnson v. Pie</i> , 1 Sid. 258, affirmed, . . .	393
<i>Porter v. Shephard</i> , 6 Term, 665, commented upon, . . .	27
<i>Regina v. Hawkes</i> , 2 Moody, 60, doubted, . . .	404
<i>Rex v. Patteson</i> , 4 B. & Ad. 9, affirmed, . . .	553
<i>Stavers v. Curling</i> , 3 Bingham, N. C. 355, examined, . . .	32
<i>Tyson v. Thomas</i> , 1 M'Cle. & Younge, 119, doubted, . . .	132
<i>Whitworth v. Gougain</i> , 3 Hare, 416, approved, . . .	121

CERTIORARI.

See COUNTY COURT.

CHALLENGE.

Of Jury.]

See *Creed v. Fisher*.

CHARGING ORDER.

Effect of.] The 1 & 2 Vict. c. 110, s. 14, empowers a judge to order that stock, &c., standing in the name of a judgment debtor, or of any person in trust for him, shall stand charged with the payment of the judgment and interest, "and such order shall entitle the judgment creditor to all such remedies as he would have been entitled to, if such charge had been made in his favor by the judgment debtor":—

Held, (by LORD CAMPBELL, C. J., WIGHTMAN, J., and CROMPTON, J.,) that the meaning of this clause is to give the judgment creditor the same right under the charging order, as against prior incumbrancers, as he would have under a valid and effectual charge made at the same moment by the debtor himself. *Watts v. Porter*, 116.

Therefore, where stock standing in the names of trustees, in trust for A, was charged by A as security for money lent to him by B, but no notice of this charge was given to the trustees, and subsequently C, a judgment creditor of A, obtained a charging order under the statute upon this stock, of which he gave express notice to the trustees, C's charge, created by the judge's order, took priority of that to B, whose title had never been perfected by notice to the trustees:—

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Held, (by ERLE, J., *dissentiente*.) that the effect of the statute is only to give the judgment creditor with a charging order the same right as he would have under a lawful charge made by the debtor; and therefore, under the circumstances, C was not entitled to the stock as against B. *Watts v. Porter*, 116.

CHARTER PARTY.

Freight.] On a declaration upon a contract to pay the highest freight which the plaintiff should be able to prove had been paid on the same voyage, (not less than 90s. per ton,) averment that all things had been done to entitle plaintiff to freight according to the charter-party; and also a special averment that the plaintiff was able to prove, as the fact was, that the highest freight paid was 7l. per ton, of all which the defendant then had notice; breach, non-payment of the freight at 7l. per ton, there being a traverse of the special allegation, and another plea that the plaintiff did not prove the fact:—

Held, on demurrer to the latter plea, that it was bad; and that on the former plea plaintiff would have to prove that the fact was as alleged, and that the defendant knew that it was so; and that this was proof enough, or dispensed with any other proof of the fact in question. *Gether v. Capper*, 275.

Semble, per MAULE, J., the general averment only applied to the lower freight. *Ib.*

See *Charles v. Alton*, 319.

COLLISION.

See SHIPS AND SHIPPING.

COMMON CARRIERS.

See CARRIERS. RAILWAYS.

COMPROMISE.

Of Accounts.]

See ACCOUNTS.

CONDITION.

Of Bond.]

See SURETY.

CONDITION PRECEDENT.

A mining lease for a term of forty-two years contained numerous covenants on the part of the lessees, some of which were of very minor importance, and almost impossible to be fulfilled; and it contained a proviso, that if the lessees, &c., should be desirous to quit the premises at the end of the first eight years of the term, or at the end of the first or any subsequent three years after the expiration of the said eight years, and of such desire give eighteen calendar months' notice in writing, &c., "then and in such case, (all arrears of rent being paid, and all and singular the covenants and agreements on the part of the said lessees having been duly observed and performed,) this lease, and every clause and thing herein contained, shall, &c., cease, determine, and be utterly void, to all intents and purposes, in like manner as if the whole of the said term of forty-two years had then run out and expired, but, nevertheless, without prejudice to any claim or remedy which any of the parties hereto, or their respective representatives, may then be entitled to for breach of any of the covenants or agreements hereinbefore contained:—"—

Held, following the opinion of the majority of the judges, and affirming the decision of the Court of Exchequer Chamber, which reversed that of the Court of Exchequer, that the performance of all the covenants by the lessees was a condition precedent to their right to determine the lease. *Grey v. Friar*, 27.

CONSTRUCTION. •

Of Declaration.]

See PLEADING.

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CONTRACT.

1. *Offer by Letter.*] In an action on a contract for the supply of goods during a term of three years, it appeared, upon the general issue, that the defendant, on the 20th November, 1852, had written to the plaintiffs a letter in which he agreed to supply them with coals, "for three years from this date," at a certain price. The defendant had answered, by another letter, that he agreed to take from the plaintiffs the whole of the coals he required, commencing from the 1st October, 1852, at the same price. There was evidence that before the 1st October the supply had been at a different price, but from and after that date, and down to the time of breach, at the rate mentioned in the letter. Upon a rule to set aside a nonsuit: —
Held, 1. That as the fact of the plaintiffs' answer having been sent in writing came out in the course of the plaintiffs' own evidence, it must be produced. *Gether v. Capper*, 274.
2. That as the letters varied in their terms, there was no contract in writing. *Ib.*
3. That the parol evidence, if it proved a contract, on the terms of the last letter, proved a contract for three years, — which was required to be in writing, under the statute of frauds. And that, therefore, the plaintiffs could not recover. *Ib.*
4. *Bought Notes — Variance.*] A broker, acting for the plaintiff, verbally contracted to buy certain hemp of the defendant, and sent him a note stating the terms, commencing thus: "Sold for Mr. C. (the defendant,) to Mr. M. (the plaintiff.)" The defendant sent back another note, commencing: "I have this day sold through you to Mr. M.," &c. The terms of the sale, as stated in the two notes, varied materially. In an action against the defendant for non-delivery, treating the note signed by him as the contract: —
Held, that the liability of the defendant depended upon the question of fact, whether the note signed by him was intended by both parties to be the contract, in which case he would be liable; or whether the defendant only intended to be bound as the seller, provided the plaintiff should also sign a note to bind himself as buyer. *Moore v. Campbell*, 522.
5. *Usage.*] Under a contract to sell and deliver goods in a warehouse in Liverpool, the giving a delivery order of "about" the quantity is a sufficient delivery, evidence of a known usage of warehouse-keepers not accepting delivery orders in any other form being admissible. *Ib.*
6. *Rescission.*] Under a contract, which was required by the Statute of Frauds to be in writing, goods were sold, to arrive by a certain ship to be taken from the quay. The purchaser afterwards verbally consented to the goods being warehoused instead of being delivered from the quay: —
Held, in an action for non-delivery of the goods, that such consent did not support a plea of rescission of the contract. *Ib.*
7. *Illegal Weights.*] A contract for the sale of a number of tons of goods by "long weight," that is, tons of 20 cwt. of 120 lbs. avoirdupois each, is not a sale by an illegal weight within the 5 & 6 Will. 4, c. 63. Per CURIAM; *multum dubitante*, PARKE, B. *Jones v. Giles*, 447.

To Employ — Construction of.] See *Emmens v. Elderton*, 1.

Construction of Contract.] See CONDITION PRECEDENT. COVENANT.

See DAMAGES. SHIPS AND SHIPPING. USE AND OCCUPATION.

COPYHOLDS.

Enfranchisement.] The 95th section of the 8 & 9 Vict. c. 18, (the Lands Clauses Consolidation Act,) declares that every conveyance of copyhold lands to the promoters of the undertaking, is to be entered on the rolls of the manor, and when enrolled to have the like effect, as if the same had been of freehold tenure; but nevertheless, until enfranchised, it is to continue subject to the same fines and services as theretofore payable. The 96th section enacts, that within a certain time the promoters are to procure the lands taken by them to be enfranchised, and for that purpose are to

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apply to the lord of the manor, and to pay him such compensation as may be agreed upon; and, in estimating such compensation, the loss in respect of the fines and other services payable on alienation, or any other matters, which would be lost by the vesting of such copyhold lands in the promoters, or by the enfranchisement of the same, is to be allowed for:—

Held, that upon an enfranchisement of copyhold lands taken by a corporation, the lord is not entitled to any fine as upon admittance upon the execution or enrolment of the conveyance, pursuant to the 95th section, or in estimating the compensation for enfranchisement under the 96th section. *Ecclesiastical Commissioners v. London and Southwestern Railway Co.* 268.

CORONER.

1. *Election of.*] The qualification necessary to give a vote in elections of coroners, must be a legal interest in lands amounting to a freehold. *Regina v. Day*, 79.
2. A right of common in gross is an insufficient qualification. *Ib.*

CORPORATION.

See JOINT-STOCK COMPANY.

Not liable for Malicious Prosecution.] See MALICIOUS PROSECUTION

COSTS.

1. *Of Rule.*] Where the court are equally divided in opinion upon a rule for a new trial, and it consequently drops, neither party is entitled to any costs of the rule. *Dansey v. Richardson*, 138.
2. *Security for.*] A plaintiff resident abroad, and engaged in the civil service of the East India Company, as a civil and sessions judge, is not exempt from the rule requiring plaintiffs to give security for costs. *Plowden v. Campbell*, 157.
3. *Security for Proceedings in Error.*] Plaintiff in error, was a foreigner residing abroad, and had given security for costs in the court below. This court, after joinder in error, stayed proceedings until security was given for the costs of the proceedings in error. *Bogleaux v. Swayne*, 193.
4. *Taxation of.*] In an action by a seafaring man, for wrongful dismissal from the service of a steam-packet company, plaintiff having obtained a verdict, a rule nisi for a new trial was obtained by defendants, which was, after argument, discharged. On taxation of costs, the master allowed plaintiff maintenance from the time of granting the rule to the time of discharging it, on the ground that plaintiff was a necessary witness, and that he could not be ready to give evidence on the second trial, unless he had remained in London, and that he had no means of earning his subsistence in London. The court, under the peculiar circumstances of the case, declined to disturb the conclusion of the master, but held, that, as a general rule, such costs ought not to be allowed. *Dowdell v. Royal Navigation Co.* 197.
5. On taxation of costs, it is a general rule to disallow the expenses of a witness rejected by the judge at the trial, as between party and party. *Galloway v. Keyworth*, 360.
6. The same rule applies to a witness rejected by an arbitrator; and where a case on being called on for trial was referred, and a witness who attended at the place of trial, and afterwards before the arbitrator on the reference, was rejected by the arbitrator, the master was held to have rightly disallowed his expenses, as between party and party. *Ib.*
7. The materiality of a witness is *primâ facie* a question for the master, but the court may review his decision on that point. *Ib.*
8. In an action for a proportion of the saving of coals effected by a patent boiler erected by the plaintiff according to a contract, an engineer attended at the trial, and before the arbitrator, who had not seen the boilers in question, but had seen the working of similar ones.

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Quere, whether he was a material witness. *Dodwell v. Royal Navigation Co.* 197.

9. *Semble*, per MAULE, J., that he was not material as between party and party. *Ib.*

10. *Semble*, that a lay arbitrator may employ a professional person to prepare his award; per MAULE, J., that he ought to do so. But where a separate charge was made for an attorney's costs of preparing the award, the arbitrator having charged a sufficient sum for the award:—

Held, that the master was right in disallowing the amount of the attorney's bill in the costs. *Ib.*

11. *Of Demurrer.*] Under the 3 & 4 Will. 4, c. 42, s. 84, the party who is successful upon a demurrer is entitled to a judgment for his costs irrespective of the termination of the suit; and where such judgment had been given for the plaintiff prior to the trial of the issues in fact, the withdrawal of a juror, with an agreement that no further action was to be brought, was

Held, to be no waiver of the plaintiff's right to these costs. *Bentley v. Dawes*, 500.

See ACCOUNTS.

COUNTY COURT.

1. *Jurisdiction.*] A surgeon, having a fixed residence, but attending upon his patients at their houses in several parishes, carries on his business within the jurisdiction of the county court in which those parishes are situate. *Mitchell v. Hender*, 194.

2. *Certiorari.*] No *certiorari* lies, to remove into a superior court interpleader proceedings in a county court. *McKillar v. Summers*, 429.

3. *Interpleader.*] The officer of a county court who has seized goods in execution, under process of that court, is not required to retire from possession of them because an interpleader summons has been issued. *Ib.*

4. *Prohibition.*] It is no ground for a prohibition to a county court, that, under process from that court to levy a sum within its jurisdiction, the officer has seized property to a greater amount. *Ib.*

COVENANT.

1. *Construction — Independent.*] An agreement made on the 21st of July, 1849, between the plaintiff and the defendants, recited that the plaintiff had erected a factory on land of the defendants for the purpose of manufacturing patent fuel; that the defendants had advanced the plaintiff 2,500*l.* towards the erection of the factory, and had agreed to grant the plaintiff a lease of the land and buildings, and to enter into conditions for the supply of coal for the manufactory and otherwise. The agreement contained the following clauses: 1. The defendants were to grant the plaintiff a lease of the land, &c., for the term of twelve years from the 25th of March last past, at a peppercorn rent, and the plaintiff was immediately thereupon to assign the lease by way of mortgage to the defendants, as security for the repayment of the advance and interest. 3. All the coals used by the plaintiff for the purpose of his manufacture during the term of twelve years were to be purchased of the defendants, provided they could supply him with the quantity that should be from time to time required by him, the coal to be good for the purpose of manufacturing steam fuel, and of that kind known as small coal; and that he was to use no other coal at the factory during the term than that bought of the defendants, except when he required more small coal than the defendants could supply him with, and except coal for the purposes of experiment. 4. The defendants were not to be liable to supply more than 500 tons per week, and if they should be unable from some substantial cause to supply small coal, they were to give the plaintiff six months' notice of such inability. The 5th and 6th clauses contained provisions for screening the coal and returning rubble coal. 7. If the coal delivered should not be of such quality as to be fit for the purposes of his manufactory, fourteen days' notice was to be given by the plaintiff. 10. The plaintiff was not to remove or take down the factory or machinery, but the same was to remain as security to the defendants for advances and for the price of the coal; and on the payment of the balance due during or at the end of the term, the company were to take the machinery and fixtures at a valuation. 11. In the

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lease to be granted to the plaintiff a covenant was to be inserted that the plaintiff was not to use the premises for any other purpose but the manufacture of patent fuel. 12. In case the plaintiff should cease to use the small coal of the defendants by reason of their inability to supply him, and should continue to occupy the premises, he was to pay 100*l.* a year for the rent of the premises. 13. That the agreement, determinable as aforesaid, should continue for the term of twelve years from this date. An action was brought by the plaintiff for a breach of the implied contract to supply 500 tons of small coal weekly:—

Held, on demurrer to several pleas. First, that the granting of a lease by the defendants was not a condition precedent to supplying the coal; that the two covenants were independent; and that the "term of twelve years" in the third clause of the agreement did not refer to the other twelve years for which the lease was to be granted. *Wood v. Governor and Company of Copper Miners in England*, 343.

2. Secondly, that the inability to supply the coal from a substantial cause mentioned in the fourth clause was no excuse for not supplying it, unless the six months' notice of the inability had been given by the defendants. *Ib.*

3. Thirdly, that the agreement referred only to coals required by the defendants for the manufacture of patent fuel. *Ib.*

4. An act of parliament, the 14 & 15 Vict. c. 105, was passed on the 21st of July, 1851, called The Governor and Company of Copper Miners' Act, 1851, for arranging the affairs of the defendants; and its 22d section provided that, after a certain reconveyance, the defendants should hold their property discharged from all rights and claims of all creditors and claimants. The 12th section referred to another action previously brought by the plaintiff against the defendants on the same contract, and which had been referred to an arbitrator, and provided that the plaintiff should be considered as a creditor for a certain amount till the award was made:—

Held, that the 22d section referred to debts or liquidated claims, and was not a bar to the action in respect of the damage which accrued after the passing of the act. *Ib.*

To repair.]

See LANDLORD AND TENANT.

Construction of.]

See CONDITION PREDECENT.

CRIME.

1. *What is, and what is not.*] The second section of the 14 & 15 Vict. c. 99, enacts that "on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or other proceeding in any court of justice, or before any person having by law, or by consent of parties, authority to hear, receive, and examine evidence, the parties thereto, and the persons in whose behalf any such suit, action, or other proceeding may be brought or defended, shall, except as hereinafter excepted, be competent and compellable to give evidence, either *viva voce* or by deposition, according to the practice of the court, on behalf of either or any of the parties to the said suit, action, or other proceeding." The act then contains certain exceptions, and, among others, the following in section 3: "But nothing herein contained shall render any person, who in any criminal proceeding is charged with the commission of any indictable offence, or any offence punishable on summary conviction, competent or compellable to give evidence for or against himself or herself:—"

Held, per CURIAM, first, that if the second section had stood without the subsequent exceptions, its language would probably include every possible case, civil or criminal, that could present itself in a court of justice; but would certainly include informations by the Attorney-General for breaches of the revenue laws. *Attorney-General v. Radloff*, 413.

2. Secondly, that the words, "in any criminal proceeding," override the whole of the above enactment in the third section. *Ib.*

3. In an information by the Attorney-General for a violation of the revenue laws, punishable by information or summary conviction at the discretion of the crown, the defendant was tendered as a witness on his own behalf:—

Held, per Platt, B., and Martin, B., that he was rendered a competent witness by the 14 & 15 Vict. c. 99. Per Pollock, C. B., and Parke, B., *contra*. *Ib.*

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4. The being concerned in unshipping goods prohibited to be imported into the United Kingdom; and the being concerned in importing foreign goods, contrary to statute, are not indictable offences. *Attorney-General v. Radolff*, 413.

CROPS.

See SALE.

CRUELTY.

Cause for Divorce.]

See DIVORCE.

DAMAGES.

1. *Duty of Judge, concerning.*] Where there is an established rule by which the jury should be governed in the measure of damages, it is the duty of the judge to bring it to their notice, and direct them in accordance with it; and his omitting to do so is ground for a new trial. *Hadley v. Bazendale*, 398.
 2. *Measure of.*] Where two parties have made a contract which one of them has broken, the damages which the other ought to receive should be, either such as may, fairly and reasonably, be considered arising naturally, that is, according to the usual course of things, from the breach of contract itself, or, such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. *Ib.*
 3. Where a contract is made under special circumstances, and those circumstances are communicated by one of the contracting parties to the other, the damages resulting from the breach of the contract which they would reasonably contemplate are, the amount of injury which would ordinarily follow from a breach of contract under those special circumstances. But if the special circumstances are unknown to the party breaking the contract, he at the most can only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. *Ib.*
 4. *Loss of Profits.*] A common carrier contracted with a miller to carry for hire two pieces of iron forming the broken shaft of a mill, and deliver the same to an artificer to serve as a model for a new one. A shaft being indispensable to the working of the mill, and the miller not having another, the mill necessarily remained idle until the new shaft could be supplied, but of this the carrier was not aware. He did not, however, deliver the iron to the artificer within a reasonable time, and, a delay having consequently arisen in the delivery of the new shaft, was sued by the miller for a breach of his agreement: —
Held, that the plaintiff could not recover as damages the loss of profits incurred by the stoppage of the mill. *Ib.*
 5. *Borradaile v. Brunton*, 8 Taunton, 535; and *J. B. Moore*, 582, doubted. *Ib.*
 6. Per Parke, B. The 8th volume of Taunton's Reports is of doubtful authority. *Ib.*
- Inadequate Damages no Ground of a New Trial.*] See NEW TRIAL.

See ACTION.

See *Theobald v. Railway Passengers Ins. Co.* 432.

Charles v. Alton, 319.

DEBTOR AND CREDITOR.

See ACCOUNTS.

DECEIT.

See HUSBAND AND WIFE,

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DECLARATION.

Construed to support Verdict, if possible.] See Emmens v. Elderton, 1.

DEVISE.

See WILL.

DISHONOR.

Of Bill of Exchange.] See BILL OF EXCHANGE.

DISTRESS.

See WATCHING AND LIGHTING ACT.

DIVORCE.

1. *Cruelty.]* The probable chance of communicating the venereal disease is not sufficient to support a charge of cruelty; there must be proof of the communication of the disease. *Ciocci v. Ciocci*, 604.
2. *Adultery.]* The consorting with prostitutes by a married man raises the presumption of adultery, unless explained and rebutted by the character of the man; and where character is relied upon as a defence, and fails in that respect, the presumption is increased. *Ib.*
3. *Evidence.]* The evidence given by paid witnesses, *testes lupanares*, and accomplices, though liable to suspicion, must be fairly weighed. *Ib.*

DRAWEE.

See BILL OF EXCHANGE.

EASEMENT.

Right of Way — User.] A plea under the statute 2 & 3 Will. 4, c. 71, of a user of a way as of right for twenty years over a close, is not supported by proof of a user of the way for part of the twenty years while M. was the landlord and owner as well of the messuage in respect of which the right was claimed as of the close over which it was exercised, and for the rest of the period when the defendant had acquired the freehold of the messuage. *Winship v. Hudspeth*, 481.

Right to Support from Adjacent Soil.] See Nicklin v. Williams, 549.

EJECTMENT.

See *Feret v. Hill*, 261.

ELEGIT.

See JUDGMENT; MANDAMUS; RAILWAYS.

EMPLOY.

Meaning of that Word in a Contract.] See Emmens v. Elderton, 1.

ESTATE FOR LIFE.

See WILL.

EVIDENCE.

1. *Of Usage.]* In an action for freight by a ship-owner against the indorsee of a bill of lading, to whom goods had been delivered at L., and who had accepted them, the

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bill of lading making them deliverable, "he paying freight for them five eighths of a penny sterling per pound, with 5l. per cent. primage and average accustomed:" —
Held, that evidence was admissible that by the custom of L. the plaintiff was entitled to a deduction of three months' discount from the freight; though such custom applied only to goods coming from certain ports in the southern states of America.
Brown v. Byrne, 247.

2. *Stamp.*] Under the 14 & 15 Vict. c. 99, s. 14, an unstamped copy of an Act Book of the Ecclesiastical Court, is sufficient evidence of the probate of a will to prove the executorship of the person named in it. *Dorrett v. Meux*, 364.

3. *Maps.*] In order to show that a house was situated in the county of N., the plaintiff tendered in evidence a map printed on paper from an engraved copperplate, having on the face of it these words: "A new map of the county of S., taken from the original map published by J. K., in 1736, who took an accurate survey of the whole county, now republished, with corrections and additions, by J. and W. K., sons of the author, 1766, and engraved by J. R." The map was produced by a witness, who was a magistrate of the two counties, N. and S. He had bought it twelve years before the trial: —

Held, that the map was not admissible in evidence. *Hammond v. Bradstreet*, 546.

Of Usage.] See *Moore v. Campbell*, 522.

Of Adultery.] See DIVORCE.

See CHARTER PARTY. INSANITY. LIBEL. USE AND OCCUPATION.

See *Great Northern Railway Co. v. Harrison*, 448.

EXECUTION.

Against a Shareholder in a Railway Company.] See RAILWAYS.

FALSE IMPRISONMENT.

See FORMER RECOVERY.

FEME COVERT.

See HUSBAND AND WIFE.

FIRE INSURANCE.

See INSURANCE.

FORMER RECOVERY.

1. *Judgment in Trover.*] Judgment recovered (though without satisfaction) against one, in an action for a conversion of goods by wrongfully selling, is a bar to an action for money had and received, against another, for the proceeds of the same sale, whether he be a party to the conversion or a stranger. *Buckland v. Johnson*, 328.

2. *Amendment.*] Declaration for money had and received, with a count in trover. Plea, that the debt became due from the defendant jointly with B, who had also jointly converted the plaintiff's goods, and that judgment had been recovered by the plaintiff against B for the same causes of action. At the trial, the count in trover was given up, and it was proved that the defendant, assisted by B, had wrongfully sold, as auctioneer, the goods in question, and that the plaintiff had recovered judgment against B, without satisfaction, for the conversion, but that the proceeds of the sale (for which this action was brought) were received by the defendant alone. The plea was then amended by striking out the allegation of the joint receipt, and substituting, that the action was for the proceeds of the sale of the goods for the conversion of which the plaintiff had recovered judgment against B: —

Held, that the amendment was right, and should be made without costs, as the plea,

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both before and after amendment, raised substantially the same defence, namely, the recovery against B : —

Held, also, that this was a valid defence. *Buckland v. Johnson*, 328.

3 *Semble*, per Jervis, C. J., that a recovery in trover for the conversion of goods, vests the property in the goods in the defendant by relation from the time of the conversion. *Ib.*

4. To an action for falsely, maliciously, and without any reasonable or probable cause, charging the plaintiff with larceny, before a justice of the peace indicting the plaintiff, and causing him to be tried on such charge, on which he was afterwards acquitted; the defendant pleaded, that before the commencement of the suit, the plaintiff brought an action of trespass against the defendant for assaulting and imprisoning him on a false and unreasonable assertion that he had committed felony; that to that action the defendant pleaded the general issue, and a justification of the assertion, and imprisonment in consequence thereof; on trial of which action the judge directed the jury to take into their consideration the question whether the defendant had charged and accused the plaintiff with having stolen the goods mentioned in the declaration, and falsely and maliciously, and without any reasonable or probable cause, committed the grievances complained of in the present action; that the jury found for the plaintiff and assessed damages accordingly, and that the plaintiff recovered judgment for the same, with costs; averring the identity of the imprisonments in the two actions, and that the grievances complained of were the same with those in respect of which damages had been given on the former occasion : —

Held, first, that this plea was no answer to the action. *Guest v. Warren*, 386.

5. Secondly, that the judge had misdirected the jury on the trial of the former action. *Ib.*

6. *Quære*, whether it would have been a defence, that on the trial of the former action, damages, in respect of the cause of action complained of in the present had been assessed by the jury with the consent of the parties? *Ib.*

See *Nicklin v. Williams*, 549.

FRAUDS, STATUTE OF.

See CONTRACT.

FRAUDULENT REPRESENTATIONS.

Effect of, on Lease.] The owner of premises, who grants a lease of them for a term, under which the lessee enters, cannot avoid the lease on the ground that it was obtained by the fraudulent misrepresentations of the lessee as to matter collateral to the lease, e. g. that he was a respectable person, and intended to use the premises for a respectable business; whereas, he was not a respectable man, and intended at the time and did afterwards use the premises for an immoral and illegal purpose.

In such a case, the lessee, having been forcibly evicted by the landlord, brought ejectment, and the court

Held him entitled to recover, as he was not enforcing an illegal contract, but merely seeking to regain possession of a term, which had become legally vested in him by the lease and entry. *Feret v. Hill*, 261.

See HUSBAND AND WIFE.

FREE PASS.

On Railways.]

See RAILWAYS.

FREIGHT.

See CHARTER PARTY. *Charles v. Alton*, 319.

Common Law.

GOODS SOLD AND DELIVERED.

See PAYMENT.

GUARANTY.

See PRINCIPAL AND SURETY.

HIGHWAY.

1. *Non-repair of — Indictment.*] By statute 5 & 6 Will. 4, c. 50, s. 95, in case of an indictment preferred by order of justices, "the costs of such prosecution shall be directed by the judge of assize before whom the said indictment is tried, or by the justices at such quarter sessions, to be paid out of the rate made and levied, in pursuance of this act, in the parish in which such highway shall be situate: provided, that it shall be lawful for the party against whom the indictment is preferred at the quarter sessions to remove it by *certiorari*." On an indictment removed into this court by *certiorari* at the instance of the prosecutor, and tried at Nisi Prius, the judge made an order that "the costs of the prosecution should be paid out of the rate made and levied in the parish of E.:" — *Held*, first, that such order might be made, though the indictment was removed at the instance of the prosecutor. *Regina v. Eardisland*, 228.
2. *Costs.*] Secondly, that it was no objection that the costs were ordered to be paid out of the rate made and levied, instead of out of the rate to be made and levied. *Ib.*
3. Thirdly, by Lord CAMPBELL, C. J., and ERLE, J., (CROMPTON, J., dissenting,) that the order need not state the amount of the costs. *Ib.*

HUSBAND AND WIFE.

1. *Conveyance by.*] The court dispensed with the concurrence of the husband, (who was living separate from his wife,) under the 3 & 4, Will. 4, c. 74, s. 91, in a conveyance of property in which the wife had a separate interest under the will of her deceased father, where the husband had refused to execute the deed. *Perrin, in re*, 292.
2. *Fraudulent Representations by Wife.*] Although a married woman is responsible for torts, and consequently for frauds, committed by her during coverture, yet it is otherwise when the fraud is directly connected with a contract by her, and is the means of effecting it, and parcel of the same transaction; and therefore, where a married woman, by a false and fraudulent representation that she was sole, induced a party to advance money to another, on the security of a promissory note signed by her: — *Held*, that no action lay against the husband and wife. *Fairhurst v. Liverpool Adelphi Loan Association*, 393.
3. *Infant.*] *Dictum per Curiam*, an infant is not liable for a fraudulent representation that he was of full age, whereby a party has been induced to contract with him. *Ib.*
4. *Marriage Promise.*] *Quære*, whether the doctrine in *Wild v. Harris*, 7 C. B. 999; 7 Dowl. & L. 114, that a married man may be sued for breach of promise of marriage to a female who at the time of making the contract with him was ignorant of his being married, ought to be upheld, such a contract being against public policy? *Ib.*
5. *Acknowledgment of Married Woman.*] On the 8th of February, 1788, Richard Bancks, by his will, devised five houses, of which he was seised in fee, to Elizabeth, his wife, for life, and after her death he devised two of these houses to his daughter Ellen, the wife of G. Fleming, for her separate use, with power to dispose of the same at her death amongst her children; and after the death of his wife, Elizabeth, he devised the other three houses to Ellen Bancks, for her sole use, with power to dispose of the same to and among her lawful issue her surviving, and their heirs forever, as she should think fit. His will further provided, that if either Ellen Flem-

ing, or Ellen Bancks, should die without issue living at the time of their respective deaths, the survivor should have that which was thereinbefore given to the deceased party for her own use; and if both should die without issue them surviving, the testator gave all the property in equal shares amongst his brothers, sister, and others. The testator died in 1788, and Elizabeth Bancks his wife, entered into possession of the five dwelling-houses, and enjoyed the same up to her death, in 1810. In 1798, Ellen Fleming intermarried with John Ollerton, the defendant, and died in 1848, without issue. On the death of Elizabeth Bancks, the plaintiff and the defendant, in right of his wife, respectively entered into possession of their respective shares of the said hereditaments. By indenture dated the 12th of May, 1843, and made between the defendant and his wife Ellen, of the first part, J. C., of the second part, John Lord and William Ackerley, of the third part, after reciting the facts, and that the said Ellen Ollerton was the testator's heiress at law, and that the said John Ollerton, and Ellen, his wife, were indebted to the said John Lord and William Ackerley for money lent, it was witnessed that the said John Ollerton and Ellen his wife, in consideration of the money so lent, and of 10s. paid to them by J. C., the said Ellen Ollerton joining therein, as well to release and convey the said hereditaments firstly and secondly thereafter described, as to release and extinguish every right and title to dower which she might have with or out of the said hereditaments and premises thirdly thereafter described, and to the intent that the then reciting indenture might operate and take effect by force or under the act for rendering a release as effectual for the conveyance of freehold estates as a lease and release by the same parties did grant, bargain, and sell, release, and convey to the said J. C. and his heirs — firstly, those two dwelling-houses and premises by the said will devised to the said Ellen Fleming, now Ollerton; and, secondly, all those three dwelling-houses and premises by the said will devised to Ellen Bancks, and all other lands, &c., which the said Ellen Ollerton was entitled to as heiress at law of the said testator, subject as to the premises secondly described, to the life estate of the said Ellen Bancks, to the said J. C. and his heirs, to the use of the said John Lord and William Ackerley, for 1000 years upon certain trusts, and after that term to such uses as John Ollerton and Ellen his wife should by deed in writing appoint, and in default of any such appointment to the use of the survivor of them as he or she might appoint by deed or direct by will, and in the mean time to the use of John Ollerton and Ellen his wife during their joint lives, and the survivor of them, their heirs and assigns; and it was in the said indenture declared that the said term of 1000 years was so limited to the said John Lord and William Ackerley for the purpose of securing the repayment of the said loan with interest. Ellen Ollerton died without having joined with her husband in making any appointment under this settlement: —

Held, that the circumstance of the remainder devolving on Ellen Ollerton as heiress at law, at the same time that her life estate took effect under the will by the death of the testator, did not operate as a merger of the life estate so as to bar the contingent remainder; but held also, that the above deed, if duly executed by Ellen Ollerton, so as to pass her interest in possession, and reversion, operated to destroy the contingent remainder; for the union of the two estates was necessary to raise the uses limited by the deed, and the life estate was therefore merged in the reversion in fee. *Bancks v. Ollerton*, 508.

6. This indenture was prepared by John Lord and William Ackerley, who were the only solicitors employed in the transaction, and was executed by John Ollerton and Ellen his wife, and was acknowledged by the latter before the said John Lord, one of the mortgagees of the said indenture, and one E. Woodcock, perpetual commissioner for taking the acknowledgments of married women, the said E. Woodcock not being in any manner interested in the transaction giving occasion for the said acknowledgment or concerned therein as attorney, solicitor, or agent, or as clerk to any attorney, solicitor, or agent so interested, or concerned, and a certificate in the form pointed out by the 3 & 4 Will. 4, c. 4, s. 84, was signed and filed of record, with an affidavit in the usual form: —

Held, that the certificate having been filed of record, and being on the face of it correct, it must be taken to be valid until set aside by the Court of Common Pleas. *Ib.*

7. *Semble*, that the acknowledgment was invalid, one of the commissioners having been

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an interested party ; and, *semble*, that the invalidity of the certificate might have been set up, had it appeared on the face of the certificate and deed that the party to whom the conveyance was made was one of the commissioners. *Bancks v. Ollerton*, 508.

See DIVORCE. LARCENY.

ILLEGAL CONTRACT.

See *Feret v. Hill*, 261, and see p. 460.

INDICTABLE OFFENCE.

What is.]

See CRIMES.

INDICTMENT.

1. *Amendment.*] An indictment for obstructing a highway, described it as a footway leading from A to B. It appeared in evidence, that the way in question passed from A to B through C, and that from A to C it was a carriage-way, and from C to B only a footway. The obstruction complained of was between C and B:—

Held, that this might be amended under the 14 & 15 Vict. c. 100, s. 1. *Regina v. Sturge*, 171.

2. A count for receiving stolen goods, alleged that the prisoner received the goods of A. B., “he, the said A. B., then knowing them to have been stolen.” After a verdict of guilty, the counsel moved in arrest of judgment, on the ground that the *scienter* was omitted ; but the court amended the count, by striking out “A. B.,” and substituting the name of the prisoner:—

Held, first, that the count was bad as it was originally framed. *Regina v. Larkin*, 572.

3. Secondly, that the objection was taken at the proper time. *Ib.*

4. Thirdly, that the indictment was not amendable after verdict. *Ib.*

5. The court ordered the record to be restored to its original state. *Ib.*

INFANT.

Ratification.] The defendant having, whilst an infant, accepted a bill of exchange, was applied to after he became of age, on behalf of the holder, and then wrote to him as follows : “Your brother tells me you are very uneasy about the 500*l.* bill drawn by Mr. P. upon me. Pray, make yourself easy about it, as I will take care that it is paid, and Sir Henry P. comes to England in June”:—

Held, per PARKE, B., and ALDERSON, B., that this was not a ratification to take the case out of the statute 9 Geo. 4, c. 14 ; but, per PLATT, B., and MARTIN, B., that it was a ratification. *Mawson v. Blane*, 560.

See HUSBAND AND WIFE.

INFORMATION.

See CRIMES.

INFRINGEMENT.

See PATENT.

INSANITY.

Evidence of.] A contract having been made between the plaintiff, who was insane, and the defendant, which it was sought to set aside:—

Held, upon an issue, whether the defendant had notice of such insanity, that evidence was admissible of the plaintiff’s conduct both before and after the signing of the contract, in order to show that the character of his disease was such that it must have developed itself to one having the opportunity of observation afforded to the defendant, though a stranger. *Beavan v. McDonnell*, 540.

See *Downer, in re*, 600.

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lease to be granted to the plaintiff a covenant was to be inserted that the plaintiff was not to use the premises for any other purpose but the manufacture of patent fuel. 12. In case the plaintiff should cease to use the small coal of the defendants by reason of their inability to supply him, and should continue to occupy the premises, he was to pay 100L a year for the rent of the premises. 13. That the agreement, determinable as aforesaid, should continue for the term of twelve years from this date. An action was brought by the plaintiff for a breach of the implied contract to supply 500 tons of small coal weekly: —

Held, on demurrer to several pleas. First, that the granting of a lease by the defendants was not a condition precedent to supplying the coal; that the two covenants were independent; and that the "term of twelve years" in the third clause of the agreement did not refer to the other twelve years for which the lease was to be granted. *Wood v. Governor and Company of Copper Miners in England*, 343.

2. Secondly, that the inability to supply the coal from a substantial cause mentioned in the fourth clause was no excuse for not supplying it, unless the six months' notice of the inability had been given by the defendants. *Ib.*

3. Thirdly, that the agreement referred only to coals required by the defendants for the manufacture of patent fuel. *Ib.*

4. An act of parliament, the 14 & 15 Vict. c. 105, was passed on the 21st of July, 1851, called The Governor and Company of Copper Miners' Act, 1851, for arranging the affairs of the defendants; and its 22d section provided that, after a certain reconveyance, the defendants should hold their property discharged from all rights and claims of all creditors and claimants. The 12th section referred to another action previously brought by the plaintiff against the defendants on the same contract, and which had been referred to an arbitrator, and provided that the plaintiff should be considered as a creditor for a certain amount till the award was made: —

Held, that the 22d section referred to debts or liquidated claims, and was not a bar to the action in respect of the damage which accrued after the passing of the act. *Ib.*

To repair.]

See LANDLORD AND TENANT.

Construction of.]

See CONDITION PREDECENT.

CRIME.

1. *What is, and what is not.*] The second section of the 14 & 15 Vict. c. 99, enacts that "on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or other proceeding in any court of justice, or before any person having by law, or by consent of parties, authority to hear, receive, and examine evidence, the parties thereto, and the persons in whose behalf any such suit, action, or other proceeding may be brought or defended, shall, except as hereinafter excepted, be competent and compellable to give evidence, either *virâ voce* or by deposition, according to the practice of the court, on behalf of either or any of the parties to the said suit, action, or other proceeding." The act then contains certain exceptions, and, among others, the following in section 3: "But nothing herein contained shall render any person, who in any criminal proceeding is charged with the commission of any indictable offence, or any offence punishable on summary conviction, competent or compellable to give evidence for or against himself or herself: —"

Held, per CURIAM, first, that if the second section had stood without the subsequent exceptions, its language would probably include every possible case, civil or criminal, that could present itself in a court of justice; but would certainly include informations by the Attorney-General for breaches of the revenue laws. *Attorney-General v. Radloff*, 413.

2. Secondly, that the words, "in any criminal proceeding," override the whole of the above enactment in the third section. *Ib.*

3. In an information by the Attorney-General for a violation of the revenue laws, punishable by information or summary conviction at the discretion of the crown, the defendant was tendered as a witness on his own behalf: —

Held, per Platt, B., and Martin, B., that he was rendered a competent witness by the 14 & 15 Vict. c. 99. Per Pollock, C. B., and Parke, B., *contrâ*. *Ib.*

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4. The being concerned in unshipping goods prohibited to be imported into the United Kingdom; and the being concerned in importing foreign goods, contrary to statute, are not indictable offences. *Attorney-General v. Radolff*, 413.

CROPS.

See SALE.

CRUELTY.

Cause for Divorce.]

See DIVORCE.

DAMAGES.

1. *Duty of Judge, concerning.*] Where there is an established rule by which the jury should be governed in the measure of damages, it is the duty of the judge to bring it to their notice, and direct them in accordance with it; and his omitting to do so is ground for a new trial. *Hadley v. Baxendale*, 398.
 2. *Measure of.*] Where two parties have made a contract which one of them has broken, the damages which the other ought to receive should be, either such as may, fairly and reasonably, be considered arising naturally, that is, according to the usual course of things, from the breach of contract itself, or, such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. *Ib.*
 3. Where a contract is made under special circumstances, and those circumstances are communicated by one of the contracting parties to the other, the damages resulting from the breach of the contract which they would reasonably contemplate are, the amount of injury which would ordinarily follow from a breach of contract under those special circumstances. But if the special circumstances are unknown to the party breaking the contract, he at the most can only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. *Ib.*
 4. *Loss of Profits.*] A common carrier contracted with a miller to carry for hire two pieces of iron forming the broken shaft of a mill, and deliver the same to an artificer to serve as a model for a new one. A shaft being indispensable to the working of the mill, and the miller not having another, the mill necessarily remained idle until the new shaft could be supplied, but of this the carrier was not aware. He did not, however, deliver the iron to the artificer within a reasonable time, and, a delay having consequently arisen in the delivery of the new shaft, was sued by the miller for a breach of his agreement:—
Held, that the plaintiff could not recover as damages the loss of profits incurred by the stoppage of the mill. *Ib.*
 5. *Borradaile v. Brunton*, 8 Taunton, 535; and *J. B. Moore*, 582, doubted. *Ib.*
 6. Per Parke, B. The 8th volume of Taunton's Reports is of doubtful authority. *Ib.*
- Inadequate Damages no Ground of a New Trial.*] See NEW TRIAL.

See ACTION.

See *Theobald v. Railway Passengers Ins. Co.* 432.

Charles v. Alton, 319.

DEBTOR AND CREDITOR.

See ACCOUNTS.

DECEIT.

See HUSBAND AND WIFE,

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and premises whereon the sale of beer had been for some time past carried on by A. B. on the defendant's account, and that the plaintiff was desirous of carrying on such trade and business for the defendant, to which he had agreed, it was witnessed that the defendant agreed for the consideration there stated, that the plaintiff should enter upon the said premises and carry on thereon such trade or business for the defendant, in the place and stead, and in the same manner, and with and on the same privileges and terms, as the said A. B. had heretofore done, until the agreement should be determined by the notice thereafter mentioned. And the plaintiff thereby agreed during all the time he should carry on the said trade on the said premises for the defendant, that all beer sold by him on the said premises, should be had by him from the defendant; and that the plaintiff should not part with the said trade or the occupation of the said premises to any person without the license of the defendant; and that, whenever either party should be desirous of putting an end to the agreement, the plaintiff should, on receiving from the defendant a month's notice, quit the said trade and deliver up possession of the said premises, and should be at liberty to leave the said trade and quit the occupation of the said premises, on giving one month's notice to the defendant:—

Held, that this did not create the relation of landlord and tenant between the parties, but that the occupation of the plaintiff was that of servant to the defendant. *Mayhew v. Suttle*, 139.

3. *Covenant to Repair.*] A declaration in covenant stated that G., who was lessee of premises for a term of ninety-nine years, expiring on the 25th of December, 1849, during the term underleased to V. and S. for twenty-five years and a quarter, from the 25th of December, 1823; that, by this underlease, V. and S. jointly and severally covenanted with G., his heirs, executors, administrators, and assigns, that they, their executors, administrators, and assigns, would, during the term granted to them, repair the premises, and at the end of the term deliver them up in repair to G., his heirs, &c.; that V. and S. entered, and that, during the underlease, G. granted his reversion to S., (one of the under-lessees,) and the plaintiffs, whereupon the term in the underlease was, as to one undivided sixth part, merged in the reversion, and S. and the plaintiffs became, as joint-tenants, possessed of the reversion of three undivided sixth parts of the premises, and the plaintiffs became, as joint-tenants, possessed of the reversion of two other undivided sixth parts of the premises; that V. afterwards assigned his interest in the underlease to S., and that thereupon the term granted by the underlease, as to one undivided sixth part, merged in the reversion in the three sixth parts whereof S. and the plaintiff were possessed, and the plaintiffs became, as joint tenants, possessed of the reversion of two of the last-mentioned three sixth parts; that S. died before the determination of the underlease; and alleged, as a breach, that, after S's death, V. had neglected to repair, and to leave the premises in repair.

The defendant paid money into court as to all the causes of action, except not leaving in repair at the end of the term; and so to such not leaving in repair at the end of the term, pleaded, that the premises were demised by L. for the term of ninety-nine years in the declaration mentioned to persons who assigned to G., with covenants to keep and leave in repair; that after G. had demised to V. and S., and before the assignment by S. to V., V. and S. by deed demised the premises to T. for twenty-three years from the 25th of June, 1825, with covenants by T. to keep and leave in repair. The plea then stated the death of T., and the devolution of his estate to M. E. T., his widow and executrix; and that L., the person then entitled to the reversion, after the deaths of S. and T., and during the continuance of all the terms, brought an action of covenant against the present plaintiffs for breaches in not repairing; that an agreement in writing for settling the action was made, on the 12th of July, 1844, between L., the plaintiffs, M. E. T., and the son of T., but without the privity or consent of V.; whereby M. E. T. agreed to pay L. 300*l.* and the costs of the action, and all rent up to the 24th of June then last, and the plaintiffs, as trustees of the property of G., agreed to pay L. 200*l.*; and M. E. T. agreed to deliver to the plaintiffs possession of the property; and the plaintiffs agreed to deliver up to F. (a depositary) the indenture of lease for the benefit of L., but to be produced from time to time for the purpose of supporting any claim by the plaintiffs upon V., or any other person, for the recovery of any rent due or to become due to the plaintiffs, or contribution, &c., in respect of any moneys to be paid by the plaintiffs under that

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agreement, in respect of the liability of the plaintiffs under the lease, or for any damages under any covenants contained in any underlease of the premises; and that when all such claims should have been satisfied, or in any manner put an end to, the said F. should deliver the lease to L., and also that M. E. T. should, at the request of L., or the person entitled to the reversion of the premises, execute a surrender of the lease; and the plaintiffs thereby agreed to concur in surrendering or assigning their interest in the said lease as L. or the person entitled to the reversion might require; and L. also agreed to accept the above sums, when paid, in full satisfaction of all claims, &c., whatsoever, under or by virtue of the said lease, for rent, dilapidations, or otherwise. The plea then stated, that the action was put an end to on the terms in the agreement specified; and that afterwards, in pursuance of the agreement, and at the instance and request, and with the privity, consent, and procurement of the plaintiffs, but without the privity or consent of V., and before the terms, or either of them, had expired by effluxion of time, the possession of the premises was given up by M. E. T. to L., who thereupon, without the privity or consent of V., entered into and kept possession thereof until, and at and after the expiration of that term by effluxion of time; and that, by means of the premises, after the possession had been so given up, V. had been prevented from entering into the said premises and repairing the same, and from yielding up the same well repaired, and had been absolutely and necessarily hindered from keeping, and that it became impossible for him to keep, the covenant in that behalf as he might and would otherwise have done:—

Held, on demurrer to the plea, that the prevention mentioned in the plea was stated only as a conclusion of law from the facts before alleged. *Badeley v. Vigurs*, 144.

4. That although V. might be unable to perform his covenant during the twenty-three years for which the underlease to T. had been granted, yet that he might have entered at the termination of that underlease for the residue of the term granted to him and S.; and that there was nothing, therefore, to prevent him from then repairing, according to his covenant. *Ib.*
5. *Merger.*] That the agreement, coupled with the giving up possession, could not, and was not intended by the parties to operate as a surrender of the interest of the plaintiffs to L. *Ib.*
6. *Held*, also, that the declaration was good, as the whole of the reversion which remained was vested in the plaintiffs alone, in respect of which they were entitled to sue on the covenant to repair. *Ib.*
7. That under the conveyance by G. to S. and the plaintiffs, one third of the reversion was at once destroyed by coalescing with half the interest under the lease which was in S.; and that, consequently, S. never took as reversioner; and there never was any suspension of the right of action by reason of S. being a party to sue and be sued. *Ib.*
8. That, even if S. took and remained interested in one sixth of the reversion until that one sixth was destroyed by the assignment to him by V., still, the right of action for not leaving in repair, which arose only at the termination of the lease, never accrued to S., and therefore was never suspended; the doctrine of a right of action being gone by suspension, applying only to the case where there has once been a subsisting right of action, and not to a case where the objection is, that, if it had accrued earlier, it could not have been enforced from the fact of the same person then being the party both to sue and be sued. *Ib.*
9. *Apportionment of Rent.*] That the plaintiffs might recover on the privity of contract, transferred by the 32 Hen. 8, c. 34, although there were an apportionment of the covenant to repair; but that, in the present case, there was no such apportionment, as the plaintiffs had the whole existing reversion, and were injured if the whole of the premises were not kept in repair. *Ib.*
10. That the plaintiffs might recover on the privity of contract, transferred by the statute of Hen. 8, where the entire interest in the covenant had not passed to them. *Ib.*
11. *Commencement of Tenancy.*] In the absence of any evidence to the contrary, the tenancy under a written agreement for the hire of premises at a yearly rental, from year to year, must be taken to begin from the day on which that agreement professes

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to have been executed; and that question is for the judge, and not for the jury. *Bishop v. Wraith*, 568.

Construction of Lease.] See CONDITION PRECEDENT.

See FRAUDULENT REPRESENTATION. USE AND OCCUPATION.

LARCENY.

1. *By Wife's Paramour.*] Delivery by the wife of her husband's goods to her adulterer, he having knowledge that she had taken them without her husband's authority, is sufficient to support an indictment for larceny against the adulterer. *Regina v. Featherstone*, 570.

2. *Bailment.*] The prisoner assigned his goods to trustees for the benefit of his creditors; but before the trustees had taken possession, and while the prisoner remained in possession of them, he removed the goods, intending to deprive his creditors of them. The jury found that the goods were not in his custody as agent of the trustees:—

Held, that he was not guilty of larceny. *Regina v. Pratt*, 574.

3. *Asportation.*] The prisoners were charged with stealing four sacks of barley and three sack bags from their master. It was proved in evidence that the prisoners and one B. were employed by the prosecutor to winnow barley, which he had mixed with canary seed. One of the prisoners fetched several sacks from the prosecutor's house, which he and B. filled with barley. The two prisoners then sent B. home before the usual time. At twelve o'clock on the night of the same day, the carter went into the stable with a lantern, and shortly afterwards the two prisoners entered the stable. In a few minutes after this, the prosecutor saw the carter in the loft above with a lantern, and found the two prisoners concealed under straw in the loft, and then, in a dust-bin in a stable beneath, he found three sacks full of barley mixed with canary seed, which he swore was of the same kind which he had mixed. It was no part of the duty of the prisoners to place the barley in sacks, or to put the sacks of barley into the dust-bin. The jury found both the prisoners guilty:—

Held, that the evidence was sufficient to support the conviction. *Regina v. Samways and Wills*, 576.

LEASE.

Construction of.] Under a lease of "all that messuage or tenement, called, &c., now or late in the occupation of C.," the boundaries given not accurately defining the premises:—

Held, that a "gateway" under a portion of the messuage, and leading to a yard behind, in which were some small houses, not included in the demise, the tenants of which had always used the gateway, did not pass, in the absence of evidence to show that it had been in the exclusive occupation of C. *Dyne v. Nutley*, 356.

Conditions in.] See CONDITION PRECEDENT.

Fraud in.] See FRAUDULENT REPRESENTATIONS.

LEGACY.

See WILL.

LETTER.

Contract by.] See CONTRACT.

LIBEL.

1. *Evidence of Malice.*] In an action for libel, where the judge has decided that the occasion of publication was justifiable, so as to render the alleged libel a privileged communication, the plaintiff, without offering any fresh evidence, is entitled to have the libel itself submitted to the jury, in order that they may say whether it does not on the face of it show express malice. *Gilpin v. Fowler*, 386.

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2. In an action for libelling the plaintiff, in the way of his business of schoolmaster, the evidence was, *inter alia*, that the plaintiff, having been for twenty years schoolmaster at the National school of the adjoining parishes of C. and L., of which the defendant, the rector of C., and another person, the vicar of L., were trustees, was requested by the defendant to undertake the Sunday school of his parish, and declined to do so. The plaintiff was then removed from the mastership of the National school, and set up a school, to gain a livelihood by it, in the defendant's parish, in a school-room used as a dissenting chapel. In a letter addressed to his parishioners, (set out in the bill of exceptions,) the defendant told them that the plaintiff's attempt betrayed a spirit of opposition to authority, and justified the managers of the National school in removing him; that "no rightly-disposed Christian, who received in simple faith the teaching of inspiration, 'Obey them who have the rule over you, and submit yourselves,' could expect God's blessing to rest upon such an undertaking," and warned them against countenancing it, either by subscriptions or sending their children to it for instruction; that it would be a schismatical school, and those who aided the plaintiff in any way would be partakers with him in his evil deeds; they were to mark them which cause divisions and offences, and avoid them, &c. POLLOCK, C. B., directed the jury that the several matters given in evidence were not sufficient to justify them in finding a verdict for the plaintiff, but showed that the paper published by the defendant was a privileged communication, and that, there being no evidence of express malice, they were bound to find a verdict for the defendant:—

Held, first, that the direction was wrong. *Gilpin v. Fowler*, 386

3. Secondly, that the paper was not a privileged communication. *Ib.*

4. Thirdly, that there was, in the circumstances of the case, evidence of malice which ought to have been left to the jury. *Ib.*

5. Fourthly, that the alleged libel ought to have been submitted to the jury, in order that they might judge whether there was any evidence of malice on the face of it. *Ib.*

LIGHTS.

See SHIPS AND SHIPPING.

LIMITATIONS.

Replication of Fraud.] To a plea of the statute of limitations, that the cause of action did not accrue within six years before the suit, it is no answer that, in consequence of the fraud of the defendant, the plaintiff was prevented from discovering the cause of action before that time, and that he commenced his action within six years after he discovered it. *Imperial Gas Light Co. v. London Gas Light Co.* 425.

LIS PENDENS.

See *Place v. Potts*, 565.

LUNACY.

See INSANITY.

MALICE.

Evidence of.]

See LIBEL.

MALICIOUS PROSECUTION.

1. *Against a Corporation.*] *Quære*, whether an action for a prosecution instituted maliciously and without reasonable and probable cause, is maintainable against a corporation? *Stevens v. Midland Counties Railway Co.* 410.

2. The prosecuting a person with any other motive than that of bringing a guilty party to justice is a malicious prosecution in law; as, for instance, where a prosecution is

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instituted against a person with the view of terrifying parties from the commission of some prevalent offence. Per ALDERSON, B., and MARTIN, B. *Stevens v. Midland Counties Railway Co.* 410.

See FORMER RECOVERY.

MANDAMUS.

Election of Church-wardens.] In the parish of B. the owners and not the occupiers of tenements, the value of which did not exceed 6*l.*, were assessed to and paid the rates for the relief of the poor, under 13 & 14 Vict. c. 99. At the election of a church-warden for the parish, the votes of certain occupiers of tenements not exceeding the value of 6*l.* were rejected, on the ground that they were not entitled to vote, and one of the candidates was declared elected:—

Held, that as the election could not, on this ground, be considered as null and void, and it was not shown that the result of the election would have been different, an application for a *mandamus* could not be entertained. *Joyce, Ex parte*, 158.

See RAILWAYS.

MAPS.

See EVIDENCE.

MARINE INSURANCE.

See INSURANCE.

MARRIAGE.

Contract of.]

See HUSBAND AND WIFE.

MASTER.

Of a Vessel.]

See BARRATRY.

MASTER AND SERVANT.

Contract to employ.] A count against the public officer of a joint-stock company stated, that on the 30th November, 1844, it was agreed between the plaintiff and the company, that from the 1st January then next, the plaintiff, as the attorney and solicitor of the company; should receive and accept a salary of 100*l.* per annum, in lieu of rendering an annual bill of costs for general business transacted by the plaintiff for the company; and should and would, for such salary of 100*l.* per annum, advise and act for the company on all occasions in all matters connected with the company, (the prosecuting or defending of suits, and the preparation of bonds or other securities, being excepted, the plaintiff being allowed in respect of such matters the usual charges of an attorney:) and it alleged, that in consideration that the plaintiff had, at the request of the company, promised to perform the same on his part, the company promised the plaintiff to perform and fulfil the same in all things on their part, and to retain and employ him as such attorney and solicitor of the company on the terms aforesaid: and assigned for breach, that the company, disregarding their promise and agreement, did not nor would continue to retain or employ the plaintiff as such attorney and solicitor of the company on the terms aforesaid, but, on the contrary, wrongfully, and without any reasonable cause, dismissed and discharged the plaintiff from such employment and retainer, and from thence hitherto have wholly refused to retain or employ him as such attorney and solicitor, or to pay him the salary aforesaid, by reason of which the plaintiff has wholly lost and been deprived of the said salary, and also of divers profits which he might have derived from such employment:—

Held, affirming the decision of the Exchequer Chamber, which reversed the judgment of the Court of Common Pleas, and in conformity with the opinions of eight out of nine of the judges who gave their opinions, that the plaintiff was entitled, after verdict, to judgment upon the above count. *Emmens v. Elderton*, 1.

See *Mayhew v. Suttle*, p. 139.

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MERGER.

- See LANDLORD AND TENANT.

MINING LEASE.

Construction of.]

See CONDITION PRECEDENT.

MISDESCRIPTION.

See INDICTMENT.

MISNOMER.

See RAILWAYS.

MONEY HAD AND RECEIVED.

Judgment in Trover — When a Bar.] See *Buckland v. Johnson*, 328.

MORTGAGE.

See JUDGMENT.

MUTINY.

See INSURANCE.

NEGLIGENCE.

Sunken Vessel.] The owner of a vessel which has been sunk in a navigable river is bound to use proper care to prevent accidents to other vessels so long as he has the possession, control, and management of the vessel, that is, so long as by due care and exertion he can either remove the vessel, or so far shift its position as to prevent such injury. This duty attaches to the ownership for the time being, and will be transferred to a purchaser of the sunken vessel; and it makes no difference that the vessel lies in a part of the channel not ordinarily used for navigation: but the duty ceases on the abandonment of the possession of the vessel. *White v. Crisp*, 582.

See *Charles v. Alton*, 319.

NEW MANUFACTURE.

See PATENT.

NEW TRIAL.

1. *In Criminal Cases.]* By LORD CAMPBELL, C. J., and CROMPTON, J. Where, in an indictment not charging an offence for which the defendant, if guilty, might suffer fine and imprisonment, a civil right comes in question, and the right would be bound by the verdict, a new trial may be granted after a verdict for defendant. *Regina v. Russell*, 230.
2. But by COLERIDGE, J. Wherever the substance of a criminal proceeding is civil, a new trial may be granted after a verdict for defendant, on the ground either of misdirection, or of the verdict being against the evidence. *Ib.*
3. *Held*, accordingly, by Lord CAMPBELL, C. J., and CROMPTON, J., (COLERIDGE, J., dissenting,) that where an indictment charged defendant with erecting an obstruction to the navigation of the Menai Straits, and the right to an oyster fishery was in question, the court ought not to grant a new trial after verdict for defendant. *Ib.*
4. By COLERIDGE, J., and ERLE, J. There was not sufficient ground for granting a new trial, either in the direction or the finding of the jury. *Ib.*
5. *Practice.]* The court refused, on the fourth day of Hilary term, to hear a motion

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for a new trial in a case tried before the under-sheriff, on the 9th of December preceding, where the notes of the under-sheriff, which had only been bespoken on the first day of term, were not produced. *Watkins v. Packman*, 291.

6. *Inadequate Damages.*] The court refused to grant a rule for a new trial, on the ground of the insufficiency of the damages, where the jury had given only one farthing damages in an action of trespass for taking the plaintiff before a magistrate, upon an unfounded charge of felony, merely because a question of character was involved. *Apps v. Day*, 335. •

7. *Excessive Damages.*] The court will not disturb a verdict merely on the ground that they would not, in their private judgment, have given such large damages as were given by the jury. They must be satisfied that the jury in awarding those damages either were actuated by some improper motive, or proceeded on some erroneous principle of assessment. *Creed v. Fisher*, 384.

See DAMAGES.

NOTICE.

Of Action.] Notice of action served on a justice of the peace, stated that he had caused plaintiff to be assaulted, and taken to a prison, and kept there, without any reasonable or probable cause. The declaration contained two counts — one for an assault; the other for maliciously and without reasonable and probable cause, issuing a warrant to apprehend plaintiff: —

Held, that the notice did not state the cause of action clearly and explicitly, as required by section 1 of statute 11 & 12 Vict. c. 44, because the action was brought under section 2; whereas the notice, by omitting the word “maliciously,” stated a cause of action under section 1. *Taylor v. Nesfield*, 235.

NOTICE TO QUIT.

See *Tress v. Savage*, 110.

PARISH.

Union of — Usage.] In the district of M. St. M. and M. St. P., there had always been one rate for maintaining the poor and repairing the roads, one set of overseers and of surveyors of the highways, and one constable; but there was evidence that there had formerly been two churches and two rectories, and that for some ecclesiastical purposes the district had been treated as two parishes. Upon appeal from a poor-rate made for the parish of M., a special case was stated, setting forth these and other facts, and giving the court power to draw such inferences from them as a jury might: —

Held, that the evidence showed that the district was a reputed parish at the time of the passing of statute 43 Eliz. c. 2, and therefore, was to be treated as one parish, as respects the maintenance of its poor. *Regina v. Sharpley*, 206.

PARTICULARS.

See PATENT.

PART OWNER.

Of a Vessel may Commit Barratry.] See BARRATRY.

PATENTS.

1. *Account of Sales.*] The 42d section of the 15 & 16 Vict. c. 83, enables the court in which any action for the infringement of a patent is pending, “to make such order for an injunction, inspection, and account,” as may to such court seem fit: —

Held, that this vests in the courts of common law the powers before exercised exclusively by courts of equity, and enables them to grant, either by interlocutory order, an account of all patent articles sold during the suit, or, after verdict for the plain-

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tiff, and as part of the final judgment in the action, an account of all profits made by the defendant since the commencement of the action, and after notice that an account would be required. *Holland v. Fox*, 133.

2. But the court has no power, where damages nominal or substantial have been recovered by the plaintiff, to order an account of profits made by the defendant prior to the commencement of the suit, the damages assessed by the jury being considered as the compensation for the loss of such profits. *Ib.*

PATENT.

1. *Infringement — Particulars of.*] In an action for infringement of a patent, it is sufficient for the plaintiff to furnish such particulars of the infringement as show distinctly what are the acts of infringement he complains of, — that is to say, the article, the making or selling of which he alleges is an infringement upon his patent, and the places at which, and the period during which, he proposes to prove such making or selling; and it is not necessary to specify in what respects, or as to what parts or processes of the invention, it is an infringement. *Talbot v. Laroche*, 286.
2. If, indeed, the processes are so entirely separate and distinct, as that different kinds of articles or results are produced, as if one produce pictures in oil and another in water colors, it seems that the particulars should specify the one, an infringement upon which is complained of; but if they are merely different modes of producing the same kind of article or result, it is not necessary so to distinguish; and it is not necessary to specify particular persons to whom, or the times at which, the article alleged to be a piracy has been sold; it is enough to state some period within which the sales took place. *Ib.*
3. *Specification.*] A patent had been obtained for improvements in the means and apparatus for working under water, in order to produce excavations and building foundations of light-houses, piers, jetties, and other structures under water. The specification described a cylinder or caisson of iron, divided into compartments and chambers, which was to be sunk to the bottom of the water, in the place where the foundation was to be made. The water was to be forced out and kept out of the caisson by an air-pump, so that, by means of the valves and passages specified, workmen might descend within the caisson and excavate at the bottom, and send up the materials to the surface through it. When a sufficient depth was attained, the foundation was to be laid, and built up of concrete or other materials within the caisson, each chamber of which was to be thus filled in turn, until the surface was reached; and the lower portion of the caisson itself was to be left as part of the permanent foundation, inclosing the solid mass of concrete or stone. The specification concluded by saying that the inventor claimed the mode of constructing the interior of a caisson in such a manner that the work-people might be supplied with compressed air, and be able to raise the materials excavated, and to make and construct foundations of buildings as above described. In an action for infringement of the patent, it was pleaded that the invention was not any manner of new manufacture, and the defendants proved that a patent had been obtained for a caisson similar in its construction, but which was to be applied to facilitate excavating, sinking, and mining, by keeping out, by means of the compressed air to be forced in, any water that might be met with during the operations: —
Held, that the inventor claimed the construction of the caisson itself, and that, as this was not new, the judge was right in telling the jury that the invention was not a new manufacture. *Bush v. Fox*, 464.
4. *Infringement — Account.*] Under the Patent Law Amendment Act, 15 & 16 Vict. c. 88, where an action has been brought for the infringement of a patent, a retrospective account of the defendant's sales and profits of the patented article will not be granted before final judgment. Neither does the act give power to order an inspection of the defendant's books containing entries relating to such sales. But, upon reasonable evidence of the existence of a valid patent, and of its having been infringed by the defendant, and of the defendant's making a profit by such infringement, the defendant will be ordered to keep an account of all sales to be made of the article alleged to be an infringement of the plaintiff's patent, and of the profits thereon, until the further order of the court, upon condition of the plaintiff's waiving

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all right to more than nominal damages at the time of the action, and undertaking, in case the verdict and judgment should be in favor of the defendant, to pay to the defendant the expense of keeping such account. *Vidi v. Smith*, 113.

PAUPER.

Settlement by Estate.] M., by his will, devised a house and land to his wife for life, and, "after my wife is deceased, the same shall be sold within six months, and be equally divided between my six children; and, providing any of them should be dead, their father's or mother's share to be equally divided between their children, whereof I choose for executors or executrixes, A. M., my wife, and W. H., my son-in-law, whereof they shall be paid their reasonable expenses." Some of the grandchildren of the testator, issue of one of his deceased daughters, were minors at the time of his death. The pauper, one of the daughters of M., and her husband, occupied the house and land at the time of his death, in August, 1844, and until they were sold under the will, in April, 1845:—

Held, that the legal estate passed under the will to the children and grandchildren of M., and not to the executors; and that the pauper had such an estate as conferred a settlement. *Regina v. Burgate*, 220.

PAVING ACT.

A local paving act enacted that no person should be capable of acting as a commissioner under it, unless rated as an occupier of lands, &c., within the town, and possessed of a certain amount of property, or until he had taken and subscribed a certain oath. In an action against one for acting as a commissioner under the act "when he was not duly qualified," the defendant proved that he was rated and was possessed of the requisite property qualification, but did not prove that he had taken and subscribed the oath required by the act:—

Held, that he was not bound to prove the oath. *Tupper v. Newton*, 336.

PAYMENT.

By Bill of Exchange.] A, at the Cape of Good Hope, sent an order for coffee to B., at Rio Janeiro, stating that "for the costs of said order, he (A) had opened a credit with C, of London, in favor of B." B sent the coffee, and drew accordingly at sixty days' sight on C, who was, and had for some time been, the common agent of both A and B. On receipt of the bill, C marked it as accepted, and afterwards accepted it formally, and entered the amount in his books to the credit of B with interest, as from the date of receipt, and at the same time debited A with the same amount, as from the same date. C stopped payment before the bill became due, and it was protested for non-payment. At no time had C assets sufficient to cover his liabilities for A on the bill and other accounts, and B was a creditor of C, when C stopped payment. B sued A for the price of the coffee:—

Held, that the circumstances did not import that B had accepted the credit as an immediate payment, and had taken the risk of C's insolvency, for that C had no right to enter it as a present payment without B's consent; and that, therefore, B was entitled to recover from A the price of the coffee. *Maxwell v. Deare*, 56.

PENAL STATUTE.

See p. 460.

PERILS OF THE SEAS.

See INSURANCE.

PLEADING.

1. *Construction of Declaration.*] If a declaration contains allegations capable of being understood in two senses, and in one sense it will sustain the action, and in the other it will not, after verdict it must be construed in the sense which will sustain the action. *Emmens v. Elderton*, 1.

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2. *Circuity of Action.*] A plea is not good in avoidance of circuity of action unless it shows that the sum which the defendant is entitled to recover from the plaintiff must, in law, be the same as that for which the plaintiff sues. *Charles v. Alton*, 319.
3. By a charter-party A agreed to pay B, the master of a vessel, one third of the freight at the final sailing of the vessel, the same to be returned to A if the cargo should not be delivered at the port of destination, A insuring at the owners' expense and deducting the costs out of the first payment. A paid the one third freight, deducting the costs of insurance. The ship and cargo were lost, and A brought his action to recover back the one third freight. B pleaded that the loss of the one third freight was a loss which A was to be insured against; that A insured so negligently that the insurance was useless; and that, by such negligence, A became liable to B for the same amount which he now claimed from B and to make good the same to B:—
Held, that the plea was bad; that the conclusion of law as to A's liability was not warranted by the facts stated, as the amount to be recovered by B as damages for A's negligence was not necessarily identical with that sued for by A. *Dubitante*, CROWDER, J. *Ib.*

See INDICTMENT. MASTER AND SERVANT. PATENT.

PRACTICE.

1. *Entering Suggestion.*] A defendant is entitled to enter a suggestion on the record, and sign judgment for his costs under the 101st section of the Common Law Procedure Act, 15 & 16 Vict. c. 76, where a plaintiff neglects to try a cause at the times mentioned in the section, and to proceed to trial at the assizes or sittings, occurring immediately after the expiration of the twenty days' notice to try, which by the section the defendant is enabled to give. *Judkins v. Atherton*, 104.
2. Notice of trial was given for the summer assizes, and the plaintiff at the assizes withdrew the record. On the 21st of February following, the defendant gave notice, requiring the plaintiff to bring on to trial the issue joined in the action at the next assizes at Liverpool, the commission day of which was the 21st of March. The defendant did not proceed to trial as required by the notice, and the defendant, on the 5th of May, entered a suggestion on the record in the terms of the 101st section, and signed judgment for his costs:—
Held, that the defendant had properly entered the suggestion and signed judgment. *Ib.*
3. *Changing Venue.*] The venue may be changed in an action upon a specialty, before issue joined, upon an affidavit disclosing special circumstances. *Pashley v. Birmingham*, 293.
4. *Administratrix.*] The defendant having died after issue joined and notice of trial given, a suggestion of his death was duly made, and his administratrix appeared and pleaded to the suggestion. The plaintiff afterwards applied to a judge at chambers for leave to discontinue on payment of the costs of the pleas to the suggestion, but the judge made the usual order on payment of full costs:—
Held, that the order was right; for that the 138th section of the Common Law Procedure Act put the administratrix in the same position as if she had been the original defendant in the action. *Benge v. Swaine*, 308.
5. The rule that the venue cannot be changed on the common affidavit after plea is still in force. *Begg v. Forbes*, 369.
6. The new rule as to change of venue only changes the practice, in so far that the order cannot be made of course, on the common affidavit, but must be made by the court or the judge, on a rule or summons, so that it may be answered in the first instance.
Semble, that the venue cannot be changed on special grounds till after issue. *Ib.*
7. Since the Reg. Gen. H. t. 1853, r. 18, an affidavit, stating the nature of the action, and that the cause of action arose in the county into which it is sought to change the venue, and that the case can be more conveniently tried there, is not the common affidavit, but is sufficiently special to support an order for the change of the venue after plea, the pleadings being before the judge or court. *Ib.*

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8. The rules of Hilary term 1853, change the practice only as to written rules; and rules by statute, or unwritten rules, remain unchanged in so far as they are not inconsistent with the new rules. *Begg v. Forbes*, 369.
9. Action on an award; plea, setting out the award and concluding with a demurrer to the declaration:—
Held, that by section 56, of the 15 & 16 Vict. c. 76, the award was part of the plea and not of the declaration, so as to enable the defendant to demur; and judgment was given for the plaintiff.
Semble, that the defendant ought to have set the award out in his plea with or without a prayer of judgment, so as to enable the plaintiff either to traverse and raise any question of fact, as to its being the award declared on, or to demur and raise any question of law, as to its construction. *Sim v. Edmonds*, 379.
10. *Affidavit*.] Where a judge declined to make an order to give the plaintiff his costs under the County Courts Act, 13 & 14 Vict. c. 61, s. 13, and an application is made to the court, fresh affidavits may be used in addition to those made use of before the judge. *Saunderson v. Proctor*, 564.

See ACCOUNTS. DAMAGES. FORMER RECOVERY.

PRINCIPAL AND AGENT.

Authority of Agent.] See BANKING COMPANY.

PRINCIPAL AND SURETY.

1. *Liability of Surety*.] The Municipal Corporation Act, 5 & 6 Will. 4, c. 76, s. 58, provides, that the council of every borough shall, in every year, appoint a treasurer of the borough, and shall take such security for the due execution of his office as they shall think proper, and in case of a vacancy, by death, resignation, removal, or otherwise, may appoint another person in his place. By section 60, the treasurer shall, at such times during the continuance of his office, or within three months after the expiration of it, and in such manner as the council shall direct, duly account for money received. By the statute 6 & 7 Vict. c. 89, s. 6, the above-mentioned provision, that the council shall, in every year, elect a treasurer, is repealed, and it is enacted, that the council of every borough shall, on the 9th of November, next after the passing of the act, appoint a treasurer, who shall thenceforth hold his office during the pleasure of the council for the time being; and in case of a vacancy, the council shall, within twenty-one days after, appoint a fresh one. Subsequent to the month of November, 1841, M. was appointed treasurer for the remainder of the year, to November, 1842, if the council should so long please. On the 9th of November, 1842, he was elected treasurer again, and continued in office for the year, until the 9th of November, 1843, when he was again elected to be treasurer, (the statute 6 & 7 Vict. c. 89, having then come into operation,) during the pleasure of the council for the time being. He remained treasurer down to June, 1848. On his first election, he entered into a bond, with sureties, who bound themselves for his duly accounting for and due payment of moneys received "during the whole time of his continuing in the said office, in consequence of the said election, or under any annual or other future election." In 1848, when he ceased to be treasurer, there were certain sums which he had received since the 9th of November, 1843, and which he had not duly paid over:—
Held, in an action against a surety, by a majority of the court, that the change made by the statute of Victoria, in the tenure of the office from that of an annual appointment to an appointment during pleasure, did not exempt the sureties from liabilities, as the duties were not altered, and they had agreed to be bound for his conduct as treasurer, not only during his first election, but under any annual or other future election. *Oswald v. Mayor of Berwick-upon-Tweed*, 85.
2. *Rights between*.] The plaintiff guaranteed A that the defendant would upon demand from time to time pay to A what should be due. A demand was made upon the defendant by A, and upon non-payment a writ was issued against the plaintiff for the amount, the writ being the first notification to him of the amount being due and unpaid. He allowed judgment to go by default, and an execution was levied upon his goods:—

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Held, that he might recover against the defendant the costs of the writ at the suit of A, but not the costs of the subsequent proceedings. *Pierce v. Williams*, 538.

See SURETY.

PRIOR ACTION.

See *Place v. Potts*, 565.

PRIVILEGED COMMUNICATIONS.

See LIBEL.

PROFITS.

Loss of, no Ground for Damages.] See DAMAGES.

PROHIBITION.

County Court.] The guardians of a poor law union issued a summons against the defendant as administrator of John I. S., and also as executor of Jane S., widow of John, to recover 17*l.*, expended by the parish for the support of John I. S. and Jane, and their children. The defendant was the administrator of John I. S., but was not nor had he acted as executor of the widow. No minute was produced by the attorney of the plaintiffs, (a corporation,) authorizing him to act on their behalf, pursuant to 5 & 6 Vict. c. 57, s. 17. Judgment was given for the plaintiffs:—

Semble, that the decision of the judgment was erroneous: but held no ground for a prohibition. *Guardians of Loxden Union v. Southgate*, 530.

See COUNTY COURT.

PROMISSORY NOTE.

See BILL OF EXCHANGE.

PROSTITUTES.

Consorting with.]

See DIVORCE.

RAILWAYS.

1. *Mandamus.*] A judgment creditor of a railway company, within the operation of the "Companies Clauses Consolidation Act, 1845," is entitled to issue execution against a shareholder, under section 36, although he has before issued an *elegit* against the lands of the company, but such lands are insufficient to satisfy the judgment debt; and the court granted a *mandamus* to compel the production of the register of shareholders for his inspection. *Regina v. Derbyshire Railway*, 101.

2. *Misnomer.*] Where a company was incorporated as the "D., S., and W. Junction Railway," and a *mandamus* had issued directed to them by the "D., S., and W. Junction Railway Company," the court, upon the argument of the *mandamus*, ordered the name to be amended. *Ib.*

3. *Accident on.*] A company called "The Railway Passengers Assurance Company," incorporated by statute, entered into a contract of insurance with a party, whereby they undertook to pay 1,000*l.*, to his legal representatives in the event of death happening to the assured from railway accident whilst travelling in any class carriage, on any line of railway in Great Britain or Ireland, a proportionate part of that sum to be paid to the assured himself in the event of his sustaining any personal injury by reason of such accident. The assured travelled in a railway carriage to a certain place, and in getting out of the carriage after the train stopped met with an injury, without any negligence on his part, and in consequence of the step of the carriage being accidentally slippery:—

Held, first, that this was a railway accident within the meaning of the policy. *Theobald v. Railway Passengers Ins. Co.* 432.

Common Law.

4. *Damages.*] Secondly, that the assured could only recover for the personal expense and pain occasioned to him by the injury, and was not entitled to damages for loss of time or loss of profit occasioned by it. *Theobald v. Railway Passengers Ins. Co.* 432.
5. Thirdly, that it was not a true measure of damage to assume 1,000*l.*, the sum insured, as the value of life, and estimate a proportionate sum for the injury sustained. *Ib.*
6. Per POLLOCK, C. B., where a party is unintentionally injured by the act of another, it is unmanly, though undoubtedly legal, to claim damages for pain and suffering. *Ib.*
7. *Free Pass.*] In an action against a railway company for injury to the plaintiff by negligence, the defendants pleaded that the plaintiff was not lawfully in their carriage. The evidence tended to show that the reporters for "Bell's Life in London," of whom the plaintiff was one, when going to races in that capacity, were accustomed to travel free. The plaintiff, acting *bonâ fide* as such reporter, was supplied with a ticket, which bore the name of a person connected with the paper, but not the plaintiff's, and on it were the words "not transferable," and a memorandum that any other person using it than the person named in it would be liable to a penalty, as if he was a passenger who had not paid his fare. The plaintiff showed this pass to one of the servants of the defendants at the station, who said it was all right, and opened the door of the carriage for him to enter:—
Held, that there was evidence to go to the jury that the plaintiff was lawfully in the carriage. *The Great Northern Railway Co. v. Harrison*, 443.

See CARRIERS.

RATES.

1. *Church Rates.*] Where the church-wardens of a parish made a single rate for providing necessary additional burial-ground for the parish, which could only be done, (if at all, under the powers given by the Church Building Acts, and also, for draining and spouting a chapel in the parish, as at common law, it was:—
Held, that the rate could not be enforced. *Regina v. Abney*, 160.
2. *Quære*, whether there is any power to make a rate for enlarging or for purchasing a burial-ground. *Ib.*
3. *Brewery — Good-will.*] A brewery and premises, together with the good-will and trade of certain public-houses, subject to the rents theretofore received for the said public-houses, were leased for seventeen years to A, yielding and paying for, and in respect of the brewery and premises, the clear yearly rent of 300*l.*, and for and in respect of the fixtures, implements, and utensils specified in a schedule, the further clear yearly rent of 50*l.*, and for and in respect of the good-will and trade of all and every, the public-houses, tenements, and premises mentioned in another schedule, the further clear yearly rent of 150*l.* A occupied the brewery and premises; and the public-houses, thirty-three in number, which were situate in different streets and places, and quite apart from the brewery, were let by A, to separate tenants, at rents about equal to the amount paid by A to his landlord. The tenants of the public-houses, as they were bound to do under an agreement, purchased from A, at the brewery, all the malt liquors, &c., consumed in their houses, and each tenant was separately rated to the poor-rate. Without the restriction as regards the purchase of malt liquors, &c., a higher rental would have been given for the public-houses:—
Held, (ERLE, J. differing in opinion,) first that the 150*l.* paid for the good-will of the public houses, was to be taken into account in estimating the ratable value of A's occupation of the brewery and premises. *Allison v. Monkwearmouth Shore*, 172.
4. Secondly, that A was not entitled to claim a deduction equal in amount, as an outgoing necessary to the obtaining, by the brewery, of the profit derived from the trade of the public-houses. *Ib.*
5. *Local Board of Health.*] The corporation of H. were constituted the local board of health of the borough, and were by section 117, of the Public Health Act, (11 & 12 Vict. c. 63,) made surveyors of highways within the district. They rented and occupied a yard within the district as a place of deposit for stones, and other mate-

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5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96. The official assignee in the first instance claimed the crops and other things seized as above mentioned by the plaintiff, and a bill was filed by him in the Court of Chancery to restrain the plaintiff from selling the same. This bill was afterwards dismissed, upon terms agreed on between the plaintiff and the assignee, and the latter then abandoned all claim to such crops and other things. The sheriff continued in possession; and the crops were subsequently sold, and produced less than the claim of the plaintiff:—

Held, that as against the defendant, the execution creditor, the plaintiff was entitled to the proceeds of the growing crops. *Congreve v. Evetts*, 493.

3. *By Sample.*] The plaintiff having agreed to sell to the defendant a quantity of oil, described as foreign refined rape oil, but warranted only equal to samples, and having delivered oil which was not foreign refined oil, but which corresponded with the samples:—

Held, that the defendant was not bound to accept the same, as he was entitled to the delivery of oil answering the description of foreign refined rape oil, and that the statement in the contract, as to samples, related only to the quality of the oil. *Nichol v. Godts*, 527.

See CONTRACT. PAYMENT. WARRANTY.

SAMPLE.

Sale by.]

See SALE.

SCIENTER.

Averment of.]

See INDICTMENT.

SEPARATION.

Of Husband and Wife.]

See DIVORCE.

SETTLEMENT.

See PAUPER.

SHIPS AND SHIPPING.

1. *Collision.*] By the admiralty sailing regulations, made pursuant to the 14 & 15 Vict. c. 79, steam-vessels are required to exhibit lights in particular positions; and the 27th section of the statute directs, that when any vessel proceeding in one direction meets a vessel proceeding in another direction, and the master perceives that, if both continue their respective courses, they will pass so near as to involve risk of a collision, he shall put his helm to port. In an action by the owners of a steam-vessel which had shown the proper lights, for a collision:—

Held, that it was for the jury to say whether or not the master of the other vessel had disobeyed the directions of the statute; and that it did not rest upon the master's opinion as to the probability of a collision. *General Steam Navigation Co. v. Mann*, 339.

2. *Action for Freight.*] To an action for freight, the defendants pleaded in bar of the further maintenance of the action, the hypothecation of the ship and freight by the master, a suit in the Admiralty Court by the obligee of the bottomry bond, a monition commanding them to bring the freight into that court, and that the freight had been paid in by them pursuant to the monition:—

Held, that the plea was a good answer to the action, as the Court of Admiralty had jurisdiction to decide upon all claims to the freight so paid into court, made by any of the parties to the suit before it. *Place v. Potts*, 565.

3. *Authority of Master.*] A British ship was sent home under the command of a master in the navy, who was placed in charge by the naval officer commanding on the station. On her voyage she met with bad weather, and put into a port at Fayal, where she was, after survey, sold at public auction to a Portuguese merchant, by the master:—

Held, that, no necessity being shown, and the proof of the validity of the sale by the

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- law of the country not being made out, the sale was invalid by the General Maritime Law, and by the Law of England. Possession decreed to the British owner, with costs. *The Eliza Cornish*, 579.
- 4. *Towage.*] Ordinary towage is service rendered in expediting an undamaged ship on her voyage. *The Kingalock*, 596.
 - 5. Extraordinary towage is a service rendered in bringing a disabled ship to a place of safety. *Ib.*
 - 6. In ordinary towage an agreement may be affected by subsequent events. *Ib.*
 - 7. In extraordinary towage the agreement is, as a general rule, binding. *Ib.*
 - 8. The state of the ship must be fully disclosed, in order that the agreement may be valid *ab initio*. *Ib.*

See BARRATRY. CHARTER PARTY. NEGLIGENCE.

SIGNATURE.

See WILL.

SLANDER.

See LIBEL.

SOLD NOTES.

See CONTRACT.

SPECIFICATION.

See PATENT.

STAMP DUTY.

- 1. *Marriage Settlement.*] The 13 & 14 Vict. c. 97, enacts in the schedule, "Settlement," that any deed or instrument whereby any definite and certain principal sum of money, or any definite and certain share in the funds of the East India Company or any other company, shall be settled, or agreed to be settled, upon any person, shall be liable to an *ad valorem* duty. A party by a marriage settlement assigned to trustees, on the usual trusts, a policy effected on his own life, and all moneys assured or to become payable by or under the said policy :—
Held, on appeal from the decision of the Commissioners of Inland Revenue, that this deed was not liable to an *ad valorem* duty under the above act. *Sanville v. Commissioners*, 484.
- 2. *Good-will of Trade.*] The transfer of the good-will of a trade is an assignment of property, within the Stamp Act, 55 Geo. 3, c. 184, and requires an *ad valorem* stamp, accordingly. *Ib.*

STATUTES CITED, EXPLAINED, &c.

82 Hen. 8, c. 84,	144
7 Ann. c. 20, s. 18, (Registration of Judgments,)	153
5 Geo. 2, c. 7, s. 4,	76
5 Geo. 4, c. 74, s. 15, (Weights and Measures,)	131
7 & 8 Geo. 4, c. 75, (Waterman's Act,)	164
5 & 6 Will. 4, c. 63, s. 6, (Weights and Measures,)	132
1 & 2 Vict. c. 110, s. 14, (Judge's Order,)	118
1 & 2 Vict. c. 110, s. 19, (Registration of Judgments,)	153
2 & 3 Vict. c. 11, s. 5, (Registration,)	153
7 & 8 Vict. c. 76, s. 4, (Leases,)	112
8 & 9 Vict. c. 106, s. 3, (Leases,)	112
14 & 15 Vict. c. 100, s. 1, (Amendments,)	171
15 & 16 Vict. c. 83, s. 42, (Patents,)	113-133
15 & 16 Vict. c. 76, s. 101, (Common Law Procedure Act,)	104

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SUPPORT.

From Adjacent Soil.] See *Nicklin v. Williams*, 549.

SURETY.

1. *Liability of.]* The condition of a bond executed by the defendant, as surety for A, recited (*inter alia*) that it had been agreed between the directors of a company and A, that A should proceed to such place in the East Indies, at such time and by such conveyance as the directors should direct, and there serve the company as engineer, at a certain monthly salary, to commence from the day of his embarkation at Southampton. The defeasance provided (*inter alia*) that if A should forthwith proceed to such place in the East Indies, at such time and by such conveyance as the directors should direct, the bond should be void. A was paid part of his salary in advance in London by a clerk of the company, who, at the same time, gave him a ticket for the steamer from Marseilles, and money for the journey to that place, but he remained at Boulogne for some time, and then returned to London : —

Held, in an action against the defendant on the bond, that the embarkation of A at Southampton was not a condition to the operation of the bond ; and that there was evidence of A having been directed by the directors to proceed to the East Indies by Marseilles, and that by his neglect the bond was forfeited. *Evans v. Erle*, 475.

2. *Release of Surety.]* A bond was entered into in January, 1851, by the defendant and others severally to the Northwestern Railway Company. The condition recited that the company had agreed to appoint L. as their coal agent, for the purpose of selling coal for them, at a salary of 100*l.* per annum, on his finding sureties for his duly accounting and his honest conduct during the time of his continuance in such coal agency ; and then stated that if L. should from time to time, and at all times, duly account and pay over the moneys received, the obligation should be void : Provided, that each of the sureties should be liable only for 50*l.* and should be at liberty to put an end to his liability on the bond, on giving the railway company six months' notice in writing. On the execution of the bond, L. entered upon his duties as coal agent, and continued therein at the fixed salary until May, 1851, when it was agreed between L. and the company that instead of the fixed salary of 100*l.* a year, L. should have a commission of 6*d.* per ton on all the coal for which he should get orders. L. after this performed the same duties as before, until the autumn of 1852, receiving or being allowed the commission, which was calculated to be, and in fact was, larger in amount than the fixed salary. The defendant never gave any notice to determine his liability. L. afterwards became indebted to the company for sums which he did not pay over. On an action against the defendant, as surety, it was

Held, that the agreement between him and the company was that he would be liable as surety, so long as L. continued coal agent at the specified fixed salary, and therefore, that the change in the mode of remuneration relieved him from responsibility. *Northwestern Railway Co. v. Whinray*, 488.

3. *Overseer.]* The acceptance of the office of overseer does not operate as a resignation of the office of assistant overseer, under 59 Geo. 3, c. 12. And even assuming that those two offices are incompatible where such assistant overseer continues to perform the duties of assistant overseer after his appointment as overseer, and is guilty of defalcations, the sureties to the bond taken under the provisions of that statute are liable. *Worth v. Newton*, 553.

4. *Semble*, that the offices of overseer and assistant overseer are not necessarily incompatible. *Ib.*

Liability of.] See PRINCIPAL AND SURETY.

TONNAGE.

See SHIPS AND SHIPPING.

TRESPASS.

For Mesne Profits.] Trespass for mesne profits ; pleas, first, not possessed ; secondly, that before the said times when, &c., W. was seised in fee, and demised for twenty-

Common Law.

one years to T., who demised to the defendant, who entered by virtue of the demise. Replication, by way of estoppel, as to trespasses since the 26th of October, 1853, setting out a writ in ejectment, in which the plaintiff was claimant, and dated the 26th of October, 1853, directed to the defendant as the tenant in possession. Averment of judgment thereon by default, and entry by the plaintiff by virtue of the judgment:—

Held, on demurrer, a good replication to both pleas: and that it was not necessary to aver notice of the proceedings in ejectment to the defendant, or that a writ of possession was issued or executed; and that entry by the plaintiff, if necessary, was sufficiently averred. *Wilkinson v. Kirby*, 371.

2. *Held*, also, that the estoppel was from the date of the writ, and that the plaintiff's title would be presumed to continue until, by rejoinder, it was shown to have determined. *Ib.*

3. *Semble*, that section 75 of the Common Law Procedure Act applies to affirmative pleadings in answer to the action, and not to pleadings by way of denial of the cause of action. *Ib.*

TROVER.

Judgment in, when a bar to Action for Money had and received.] See FORMER RECOVERY.

TURNPIKE ROAD.

1. *What is.]* The hamlet of W., within and part of the parish of B., was, by a local act, constituted the town of W., and placed under the management of commissioners, and the surveyor of the highways was required to pay a proportion of the highway rates of the parish to the commissioners, W. continuing liable to contribute to the parish rates. By another local act, 7 Geo. 4, c. 10, "for maintaining a turnpike road from W. to L., and groynes, embankments, and other sea defences, for protecting such road and the lands adjoining from the future encroachments of the sea," trustees were appointed to carry the act into effect, with power for such purpose to levy and assess rates upon the owners of the land; and, by section 47, the powers and authorities conferred by the former local act, were not to be affected, except that the commissioners were to be relieved from maintaining and protecting so much of the road as was within W. The Public Health Act, 11 & 12 Vict. c. 63, was afterwards applied to W., and a local board was appointed, which was to execute the office and have all the powers, &c., of surveyors of highways, except where such powers, &c., might be inconsistent with the act, and the inhabitants of any district were not to be liable to highway rate or other payment, not being toll, in respect of making or repairing roads or highways within any parish, township, or place, situate beyond the limits of such district. Portions of the turnpike road being out of repair, and the revenues accruing to the trustees under the local act being insufficient to keep it in repair and preserve the embankments, &c., an order was made, under 4 & 5 Vict. c. 59, upon the surveyor of the highways of B. for payment of a portion of the highway rates to the trustees, to be laid out in the repair of the portion of the turnpike road within the parish of B.; and this order being appealed against:—

Held, first, that the road in question was a turnpike road, within the 4 & 6 Vict. c. 59. *Regina v. Lancing Turnpike Roads*, 185.

2. Secondly, that, by the 7 Geo. 4, c. 10, the management of the road was transferred from the commissioners to the turnpike trustees, the latter having the ordinary right to seek relief from the parish in case of the deficiency of funds, and the parish being liable to an indictment for non-repair of the road. *Ib.*

3. Thirdly, that, under the Public Health Act, the part of the parish without the district of the local board, in case of the deficiency of turnpike funds, was liable to contribute to the repair of any part, within the parish and not within the district, whilst the district alone was liable to contribute to the repair of any part of the road within it; the former powers of the surveyor of the parish to make a highway rate no longer existing, and the two parts of the parish being entirely distinct, for the purpose of contributing to the repair, both of the turnpike road, and of the general highways. *Ib.*

Common Law.

Held, also, that the local board of health were made the surveyors of the highways within the district, and empowered to make a highway rate for the purpose of contributing towards the deficiency of the turnpike funds; and that the order appealed against was, therefore, invalid. *Regina v. Lancing Turnpike Roads*, 185.

USAGE.

See CONTRACT. EVIDENCE.

USE AND OCCUPATION.

Although an action for use and occupation requires some agreement, express or implied, to pay for the occupation; yet, there may be a liability for use and occupation, where no action for rent could be maintained; therefore, if a party enter under an agreement for a demise at a certain rent — the rent not to commence until repairs are completed by the landlord, the agreement being silent as to the terms of present occupation — the entry and occupation before the repairs are executed may be evidence to go to the jury of an implied agreement to pay in the meanwhile what the premises were worth: and even if the tenant leave before the repairs are executed, the question will be, whether there was such an implied agreement; and if there were, he will be liable for a reasonable compensation for his occupation. *Smith v. Eldridge*, 285.

USER.

See EASEMENT.

VARIANCE.

See CONTRACT. INDICTMENT.

VENDORS AND PURCHASERS.

See JUDGMENT.

VENEREAL DISEASE.

See DIVORCE.

VERDICT.

When set Aside.]

See NEW TRIAL.

WARRANTY.

1. *Representation.*] The defendant, having sent his horse to Tattersall's to be sold by auction, on the day previous to the sale saw the plaintiff (with whom he was acquainted) examining the horse, and said to him, *bonâ fide*, "You have nothing to look for, I assure you; he is sound in every respect;" to which the plaintiff replied, "If you say so, I am satisfied," and desisted from his examination. The horse was put up the next day to auction, without a warranty, and the plaintiff bought him, being induced, as he said, by the defendant's assurance of soundness: —

Held, in an action for a breach of warranty, that there was no evidence to go to the jury of a warranty, the representation not being made in the course of or with reference to the sale. *Hopkins v. Tanqueray*, 254.

2. *Auction.*] If a private warranty, with a view to the sale by auction, be given to an individual by the owner of goods, which are afterwards put up to auction without a warranty, and the person to whom the warranty is given either bids for or buys them: —

Quære, whether the transaction is either legal or valid between the parties? *Ib.*

See INSURANCE. SALE.

WATCHING AND LIGHTING ACT.

In the parish of K., a district for ecclesiastical purposes had been assigned under the

Common Law.

1 & 2 Will. 4, c. 88, to the chapel of B., for which chapel wardens were appointed, but they had authority only in ecclesiastical matters, all parochial business of the district being always transacted by the church-wardens of K. at large. A notice convening a meeting for the purpose of considering whether the 8 & 4 Will. 4, c. 90, (the Watching and Lighting Act,) should be adopted in the B. district, was upon a requisition of the rate-payers of the district issued by the district chapel wardens. The meeting was held and the act adopted in the district; and inspectors were appointed, who made orders on the overseers of K., to levy certain sums of money for the purposes of the act. The overseers having neglected to obey these orders, an application was, more than two years after the adoption of the act, made to justices for a distress warrant against the overseers, but they refused to issue it:—
Held, that the act had never been legally adopted in the district, as the notice for convening the meeting could only be properly given under the act by the church-wardens of the parish at large, who were the persons usually calling meetings on parochial business, and that consequently the justices were not bound to issue their distress warrant:—
Held, also, that the whole of the proceedings being void, the objection was open, notwithstanding the time which had elapsed. *Regina v. The Overseers of Kingswinford*, 106.

WATERMAN'S ACT.

Penalty.] The 37th section of the Waterman's Act, (7 & 8 Geo. 4, c. 75,) imposes a penalty on any person, (other than a freeman of the Waterman's Company, or an apprentice to a freeman or widow of a freeman,) who shall work or navigate, "any wherry, lighter, or other craft," from or to any place or places, or ship, or vessel, within the limits of the act:—
Held, that this does not extend to a person who works a steam-tug for the purpose of towing vessels on the river. *Reed v. Ingham*, 164.

WAY.

Right of.] See EASEMENT.

WEIGHT.

Sale by Illegal Weight.] See *Jones v. Giles*, 447.

WILL.

1. *Estate for Life.*] A testator devised real property to A for life, and after his decease to the first son of the body of A for life, and after the decease of the last-mentioned first son of A, to the first son of the body of such last-mentioned son, with remainder to the second, third, and all other sons of the body of such last-mentioned son forever, the elder being always preferred to the younger; and in default of all such issue, the estate to go and descend to the testator's own right heirs forever. At the date of the will, A had two sons and two daughters living:—
Held, that A's first son took only an estate for life, with remainder in tail to his first and other sons, with an ultimate reversion to the right heirs of the testator. *Kershaw v. Kershaw*, 127.
2. *Construction of.*] A testator devised freehold and leasehold property to his son John, his heirs and executors, so far as the nature of the property would admit, and in case of his decease without leaving issue, gave the same to his son William and his heirs. He devised other property to his son William and his heirs, with a similar proviso in favor of John. And in the event of the decease of both John and William without leaving issue, he gave both properties to his daughter M.:—
Held, that the combination of personalty and realty in the same gift was not sufficient to vary the settled construction of the words "dying without leaving issue" in the case of realty, and that, therefore, John and William took estates tail in the freeholds respectively devised to them, with cross-remainders in tail in the same. *Barford v. Chadwick*, 302.
3. *Annuity.*] A testator devised to his son R. T. an annuity or rent-charge of 300*l*.

Common Law.

issuing out of land, and by a codicil declared, that in case his son should marry it should be lawful for him to settle an annuity of 300*l.* upon the woman he might happen to marry, by way of jointure, to be charged on the premises in like manner with the sum of 300*l.* devised by the will; and in case the said R. T. should so settle an annuity, it should be by way of substitution for the annuity given by the will, and that on such substitution the annuity given by the will should cease. R. T. having married, by a deed-poll made in exercise of the power given by his father's will, settled and appointed an annuity by way of jointure on his wife, declaring the same to be charged on the testator's estate, in like manner as the annuity of 300*l.* was charged by the will: —

Held, that this annuity took effect during the life of R. T. and his wife, and was not postponed till the death of R. T.; the testator's intention being that, in the event of the wife surviving her husband, she should receive the annuity by way of jointure and in bar of dower. *Jamieson v. Trevelyan*, 502.

4. *Destruction of.*] A became of unsound mind, and while in that state destroyed his will. He recovered, and gave directions for the preparation of another will, to the same effect as the will destroyed. Before this was prepared, he destroyed himself. Probate granted of the unexecuted draft of the original will. *Downer, in re*, 600.

5. *Signature.*] The deceased desired the subscribing witnesses to place their names to his will, telling them of alterations therein made, but did not sign his name again: —

Held, a good reëxecution by acknowledgment. *Dewell, in re*, 603.

See ADMINISTRATION.

WITNESSES.

See CRIMES. DIVORCE.

YEARLY TENANCY.

See *Tress v. Savage*, 110.

